Supreme Court, U.S.
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No. 04-1170

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

MICHAEL LEE MARSH, II,

Respondent.

On Writ of Certiorari
to the Supreme Court of the State of Kansas

JOINT APPENDIX

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Petition for Certiorari Filed March 2, 2005
Certiorari Granted May 31, 2005

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RELEVANT DOCKET ENTRIES

1. BEFORE THE CRIMINAL DEPARTMENT IN THE EIGHTEENTH JUDICIAL DISTRICT, SEDGWICK COUNTY, KANSAS, CASE NO. 96 CR 1157

1.	6/24/96	Complaint/Information.
2.	6/24/96	Notice of Intent to Request Separate Sentencing Proceeding with attached Exhibit (State's A-Complaint/Information).
3.	5/28/97	Motion to Strike Death Penalty Sentence for Unconstitutional Weighing of Aggravators and Mitigation.
4.	7/24/97	Response to Defendant's Motion to Strike Death Penalty for Unconstitutional Weighing of Aggravating and Mitigating Factors with attached article by Kansas University Law Professor Stephen McAllister titled Federal Constitutional Requirements Governing Trial, Sentencing and Direct Review in Capital Cases.
5.	7/24/97	Amended Response to Defendant's Motion to Strike Death Penalty for Unconstitutional Weighing of Aggravating and Mitigating Factors.
6.	8/26/97	Supplemental Memorandum in Support of Accused Filing No. 41 "Motion to Strike Death Penalty Sentence for Unconstitutional Weighing of Aggravation and Mitigation."
7.	7/2/98	Transcript of Pretrial Hearing, November 7, 1997 Proceeding.

8.	8/4/98	Transcript of Jury Trial, December 8, 1997 Proceedings.
9.	8/4/98	Transcript of Jury Trial, December 9, 1997 Proceedings.
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11.	8/4/98	Transcript of Jury Trial, December 11, 1997 Proceedings.
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1.	5/7/98	Docketing Statement/Death Penalty Case.
2.	5/7/98	Notice of Appeal Filed by Michael Lee Marsh, II.
3.	5/7/98	Order Appointing Counsel.
4.	3/29/01	Motion to Stay Brief Due Date/or Extension of Time to File Brief – Marsh.
5.	4/12/01	Memo Order Granting Motion to Stay in Part, Appellant's Brief Due 60 Days After Decision of *Kleypas* – Resp Noted.
6.	3/8/02	Brief Received/Michael Lee Marsh, II.
7.	3/27/02	Supplemental Brief/Michael Lee Marsh, II.
8.	1/7/03	Brief Received/State.
9.	4/4/03	Reply Brief/Michael Marsh.
10.	7/18/03	Cause Scheduled for Hearing/Monday 09/08/03 1:30 PM.
11.	12/17/04	Judgment Docketed-Opinion Filed/Affirmed Part, Reversed Part & Remanded w/Dirs. – Allegrucci, Luckert, Gernon & Beier, JJ.
12.	12/17/04	Memo Motion/to Stay Mandate – State.
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14.	12/29/04	Motion for Rehearing/Modification/State.
15.	1/6/05	Response-/ to Motion for Rehearing – Marsh.
16.	2/2/05	Motion for Rehearing or Modification-Denied/State of Kansas (Resp Noted).
17.	3/7/05	Memo Notation/Petition for Writ of Certiorari Placed on 3/3/05 Docket.

18.	6/6/05	Memo Notation/Certiorari Granted, Parties to Brief & Argue Two Additional Questions.

[Filed May 28, 1997]
Accused Filing No.41

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff	)	CASE NO. 96-CR-1157
vs.	)	
MICHAEL LEE MARSH, II Defendant.	)	

MOTION TO STRIKE DEATH PENALTY SENTENCE FOR UNCONSTITUTIONAL WEIGHING OF AGGRAVATORS AND MITIGATION

COMES NOW Michael Marsh and moves this Court to strike as unconstitutional the death penalty sentencing scheme set out in K.S.A. 21-4624. The statute provides that, if the sentencer finds at least one aggravator and some mitigation, that a death sentence is mandatory if the aggravation is not outweighed by the mitigation. Thus, if the mitigation weighs less than the aggravation *or* the aggravation and mitigation are in equipoise, then death is mandatory. This procedural scheme, rather than one which requires the aggravation to outweigh the mitigation before death can even by considered, violates the state and federal constitution. It threatens arbitrary results that are virtually unreviewable by the appellate courts, as statutorily required. It compromises the individualized consideration demanded in a death penalty case. This reverse weighing is unconstitutional.

A written brief and/or oral argument will be presented in support of this request. Mr. March requests a hearing be granted on this motion.

Authority:

U.S. Const. Amends. V, VI, VIII and XIV
Kansas Const. B. of R. Sec. 9 and 18
People v. Young, 814 P.2d 834 (Colo. 1991)
State v. Weigel, 228 Kan. 194 (1980)
K.S.A. 21-4624, 4625, 4626, and 4627

Respectfully submitted,

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Attorney for the Accused

[Dated July 24, 1997]

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316-383-7230

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff	)	CASE NO. 96 CR 1157
vs.	)	DIVISION NO. 20
MICHAEL LEE MARSH, II Defendant.	)	

RESPONSE TO DEFENDANT'S MOTION TO STRIKE DEATH PENALTY FOR UNCONSTITUTIONAL WEIGHING OF AGGRAVATING AND MITIGATING FACTORS

COMES NOW the State of Kansas, by and through James E. Puntch, Jr., Assistant District Attorney, and makes the following response to Defendant's motion:

1. Defendant claims that the Kansas law for weighing aggravating and mitigating factors is unconstitutional. This claim is wrong. It is because the aggravating and mitigating factors are to be weighed that the law is constitutional.

2. The Kansas law requires that the sentencing jury weigh any aggravating factors found to exist beyond a reasonable doubt against any mitigating factors found to exist. The

essential claim of the defendant is that it is unconstitutional to require him to carry the burden of proving by a preponderance of the evidence that mitigating factors exist. Specifically he claims that it is unconstitutional that ties "equipose" do to the state. Although the defendant claims that this is unconstitutional he cites to U.S. Supreme Court cases on this point. He cites one Colorado case and one Kansas case. Neither are apposite.

3. The question of whether such a sentencing plan violates the Unite States Constitution was decided against the defendant years ago, although that fact is not noted in his brief. Walton v. Arizona, 497 U.S. 639, 111 L.Ed. 2d 511, 100 S.Ct.3047 (1990). In relevant part that decision states:

> "So long as a State's method of allocating the burdens does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."

Walton, *supra*, @ p.650.

As for the claim that in some situations death is mandatory, that is not the case. Walton, *supra*, reviewed that notion and concluded that so long as the jury is not precluded from considering ant type of mitigating evidence and does not automatically impose death upon conviction for certain types of murder, it is not impermissibly mandatory. Walton @ pps. 651 & 652.

4. The Kansas case cited by defendant has nothing to do with weighing aggravating and mitigating factors nor does it deal with the death penalty.

5. The Colorado case cited is based solely upon the Colorado State Constitution. In addition, the Colorado law differed from the Kansas law, particularly in the matter of aggravating circumstances.

6. The question of the constitutionality of the Kansas death penalty law, including this issue, was extensively reviewed in by Kansas University law professor Stephen McAllister in his article *Federal Constitutional Requirements Governing Trial, Sentencing and Direct Review in Capitol Cases*, Journal of the Kansas Bar Association, October 1995. A copy of that article is attached to this response. Professor McAllister notes that the Kansas system for weighing is constitutional. The defendant's motion should be denied.

/s/ James E. Puntch
James E. Puntch, Jr.
Assistant District Attorney

[Filed July 24, 1997]

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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff	)	CASE NO. 96 CR 1157
vs.	)	DIVISION NO. 20
MICHAEL LEE MARSH, II Defendant.	)	

AMENDED RESPONSE TO DEFENDANT'S MOTION TO STRIKE DEATH PENALTY FOR UNCONSTITUTIONAL WEIGHING OF AGGRAVATING AND MITIGATING FACTORS

COMES NOW the State of Kansas, by and through James E. Puntch, Jr., Assistant District Attorney, and makes the following response to Defendant's motion:

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2. The Kansas law requires that the sentencing jury weigh any aggravating factors found to exist beyond a reasonable

doubt against any mitigating factors found to exist. The essential claim of the defendant is that it is unconstitutional to require him to carry the burden of proving by a preponderance of the evidence that mitigating factors exist. Specifically he claims that it is unconstitutional that ties or "equipose" go to the state. Although the defendant claims that this is unconstitutional he cites to U.S. Supreme Court cases on this point. He cites one Colorado case and one Kansas case. Neither are apposite.

3. The question of whether such a sentencing plan violates the Unite States Constitution was decided against the defendant years ago, although that fact is not noted in his brief. Walton v. Arizona, 497 U.S. 639, 111 L.Ed. 2d 511, 100 S.Ct.3047 (1990). In relevant part that decision states:

> "So long as a State's method of allocating the burdens does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."

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differed from the Kansas law, particularly in the matter of aggravating circumstances.

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/s/ James E. Puntch
James E. Puntch, Jr.
Assistant District Attorney

[Served August 26, 1997]
Accused Filing No. 99

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff	)	
vs.	)	CASE NO. 96-CR-1157
MICHAEL LEE MARSH, II Defendant.	)	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ACCUSED FILING NO. 41 "MOTION TO STRIKE DEATH PENALTY SENTENCE FOR UNCONSTITUTIONAL WEIGHING OF AGGRAVATION AND MITIGATION"

Mr. Marsh filed his motion to strike the death penalty via Accused Filing No. 41 which was argued on August 12, 1997. Because there appeared to be some confusion regarding the grounds for this motion, Mr. Marsh submits the following in clarification and in further argument in order to convince the court of the righteousness of his request.

The Kansas Weighing Scheme

K.S.A. 21-4624 provides for a mandatory sentence of death where the aggravating circumstance(s) is (are) not outweighed by any mitigating circumstances.

Under the current Kansas scheme, one convicted of capital murder faces a subsequent penalty trial on the issue of whether the death penalty shall be imposed. At least one statutory list of aggravating circumstances must be found by

the jury. The accused may present evidence of mitigating circumstances, either statutory or non-statutory. The jury must designate, in writing, those aggravating circumstances it finds to exist, but the statute does not require the jury to disclose mitigating circumstances found. Assuming they jury follows the law, three results could occur if a verdict is reached:

(a) the aggravation could outweight the mitigation. The result is mandatory death.

(b) the aggravation and the mitigation could weigh equal. The result is mandatory death.

(c) the mitigation could outweigh the aggravation. The result is life.

Thus, of the three verdicts possible, only (c) provides the accused with an accounting of the weighing process. If death is imposed, the accused cannot know if aggravating circumstances outweighed mitigating circumstances or if the two were in balance. If either (a) or (b) above occur, the sentence *shall* be death without any further consideration by the jury. This point was especially troublesome for the Colorado Supreme Court in People v. Young, 814 P.2d 834 (1991).

Argument and Authority

K.S.A. 21-4624, in providing for a mandatory death sentence where aggravating circumstance(s) is (are) not outweighed by any mitigating circumstances, violates Section 9[1] and/or Section 18[2] of the Kansas Bill of Rights.

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[1] All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident and the presumption great. Excessive bail shall not be required, no excessive fines imposed, nor cruel or unusual punishment inflicted.

[2] All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law and justice administered without delay.

As the request of this motion is to determine the constitutionality of our death penalty statute under our state constitution's Bill of Rights, the failure of ". . . the United States Supreme Court [to address] the constitutionality of a mandatory death penalty when the jury concludes that aggravating and mitigating factors are equally balanced . . ."[3] does not control the issue here. Logic would dictate, however, that in the absence of Federal persuasive guidance, the court should turn to the persuasive guidance of sister states. The Colorado statute held to be unconstitutional in Young is indistinguishable from the statute currently law in Kansas. And just as the Colorado Supreme Court looked to its own constitution to judge the legality of their statute, this Court his now asked to do likewise.

The Young court based its determination upon two provisions of the Colorado state constitution: Article 2, Section 20 ". . . nor cruel and unusual punishments inflicted," and Article 2, Section 25, "No person shall be deprived of life, liberty or property, without due process of law."

The Kansas counterpart to Colorado's Article 2, Section 20 is our Section 9 of the Bill of Rights.[4]

Our counterpart to Coloardo's Article 2, Section 25, is Section 18 of our Bill of Rights.[5]

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[3] People v. Young, 814 P.2d 834, 845 (1991). Even the dissent of Justice Erickson in Young concedes that the U.S. Supreme Court has not ruled upon the Federal Constitutionality of a statute such as ours. Young, 814 P.2d at 860).

[4] Note that the Kansas section prohibits cruel or unusual punishments rather than cruel and unusual punishments. And the Kansas Supreme Court has distinguished between "cruel" and "unusual" [See *e.g.*, State v. Freeman, 223 Kan. 362 (1978) (analyzing factors for "cruel" punishment); State v. Gillmore, 88 Kan. 835 (1913) (analyzing a punishment as "unusual," without reference to cruelty)] In other cases, cruel/unusual are treated together as if joined by an "and", [See *e.g.*, State v. Strauch, 239 Kan. 203, 200 (1986).

It is clear from the Young opinion that Colorado's Supreme Court's decision invalidated their statute under both the Colorado "cruel and unusual punishment" clause and the state's due process clause independently of each other.

Research of our own "cruel OR unusual" punishment clause clearly reveals that this section of the Kansas constitution has been interpreted to provide broader protection to individuals than the United States Constitution's Eighth Amendment[6].

Section 18 of the Kansas Bill of Rights, the state Due Process Clause, is less well-defined by litigation. The Young court's analysis of Colorado's due process clause should serve as a blueprint for the Kansas interpretation of our own Due Process Clause.

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[5] Our "due course of law" provision has evolved to the present understanding that Section 18 is a "due process" clause applicable to criminal cases. As far back as In re Petric, 1 Kan. App. 191 (1895), our first Court of Appeals suggested that Section 18 applies to criminal cases. In State v. Simms, 184 Kan. 587 (1959) and Ware v. Pinball Machines, 222 Kan. 416, 419 (1977), the Kansas Supreme Court specifically noted that Section 18 is the due process clause of our state constitution.

[6] In Harmelin v. Michigan, 501 U.S. ___, ___, 111 S.Ct. 2680, 2686, 115 L.Ed.2d 836, 846 (1991), the United States Supreme Court stated: "... the Eighth Amendment contains no proportionality guarantee." Kansas, however has long held that sentences should be evaluated for proportionality. *See*, State v. McCloud, 257 Kan. 1 (1995) (proportionality review); State v. Weigel, 228 Kan. 194 (1980) (criteria which are to be considered in determining what is cruel or unusual punishment as to the length of a sentence include excessiveness, disproportionality, lack of necessity, unacceptability to society, and arbitrariness of infliction); State v. McDaniel and Owens, 228 Kan. 172 (1980) (duration of sentence may violate Kansas Bill of Rights, §9). State v. Tyler, 251 Kan. 616 (1992) (the Court again analyzed a cruel/unusual punishment claim under separate rational for a Federal and for a State challenge); State v. Schultz, 252 Kan. 819 (1993), (same as Tyler, *supra*.)

Weigel provides the criteria to be applied in the proportionality analysis required by Section 9 of the Kansas Bill of Rights in a question regarding the length of a sentence. Since the death penalty is undeniably qualitatively different from any prison sentence[7], surely the criteria defined in less serious cases should apply here. In fact, Weigel clearly holds that the listed criteria are only some of those which should be considered. Further, it is clear the Weigel decision went against the accused because *none* of the criteria was present in his case.

While none of the Weigel criteria should be ignored by this Court, it appears that violation of any of the criteria should cast doubt upon the present statute's constitutionality under Kansas' Section 9 proscription against cruel or unusual punishment.

The Colorado Court in Young clearly held that Colorado's constitutional proscription against cruel and unusual punishment provision, like its Federal counterpart, requires that a death sentence be both certain and reliable. The Court went on to analyze its statute – virtually identical to K.S.A. 21-4624 – and hold that the statute's balancing provision fails the certainty/reliability test. The Young court went on to say that the certainty/reliability requirements are based upon the recognition that there is a qualitative difference between the penalty of death and all other penalties:

> "a death sentence imposed in such circumstances violates the requirements of certainty and reliability and is *arbitrary and capricious in contravention of basic constitutional principles*" Young at 845; (emphasis added).

Weigel lists is "*arbitrariness* of infliction" as one of the criteria which underlies our state's cruel or unusual punishment clause. Weigel at 203. (emphasis added). The

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[7] Woodson v. North Carolina, 428 U.S. 280 (1978).

remaining Weigel criteria also weigh against permitting this statute to stand. When mitigators and aggravators are in equipoise, certainly the death sentence is *excessive, disproporionate, unnecessary,* and *unacceptable to society.* Id.

CONCLUSION

K.S.A. 21-4624, in providing a mandatory death penalty unless the mitigation outweighs the aggravating circumstances is identical to the Colorado statute considered and found unconstitutional in People v. Young. Kansas' broader provision against cruel OR unusual punishments should provide at least the same protections as the Colorado provision.

Our cruel or unusual punishment clause has been previously interpreted in cases involving length of punishment to provide broader protection of citizens than the United States Constitution. Although the request here is made solely under state law, it is persuasive that no United States Supreme Court case deals directly with the issue here presented. As in Colorado's unconstitutional statute, the defects in our statute can easily be remedied by legislative action, but as presently written, the Kansas death penalty is unconstitutional under Sections 9 and 18 of the Kansas Bill of Rights to the Kansas Constitution.

Respectfully submitted,

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Supreme Court No. 7688

Attorney for the Accused

[Filed July 2, 1998]

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff	)	
	)	98-81135-S
vs.	)	
	)	96 CR 1157
MICHAEL L. MARSH II, Defendant.	)	Division 20

TRANSCRIPT OF PRETRIAL HEARING
NOVEMBER 7TH, 1997 PROCEEDINGS

Transcript of proceedings had and entered of record in the above-entitled case on the 7th day of November, 1997, before the Honorable Clark V. Owens II, Judge of Division 20. of the Eighteenth Judicial District of Kansas.

APPEARANCES:

For the State:

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For the Defendant:

Mr. Ronald E. Wurtz and
Mr. Jeffrey A. Moots
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* * *

[Court] [41] The next one is case filing Number 41, which is the Motion to Strike Death Penalty Sentence for Unconstitutional Weighing of Aggravators and Mitigation.

The defense maintains that the Kansas Death Penalty is unconstitutional since it provides for the jury to impose a death penalty if it finds aggravating factors which are not outweighed by mitigating factors. The statute would provide for a death verdict if the aggravating factors and mitigating factors balanced equally.

The defense relies upon the Colorado case of People versus Young, where the Colorado Supreme Court is interpreting the Colorado State Constitution.

The state relies upon the United States Supreme [42] Court decision of Walton v. Arizona that finds it permissible under the United States Constitution to require the defense to prove mitigating circumstances by a preponderance of the evidence.

I believe that the Kansas Supreme Court would be hesitant to interpret its own Constitution more strictly than the United States Constitution as interpreted by the United States Supreme Court.

The Walton case appears to be the controlling case on this issue. So, for that reason I'm going to overrule the motion.

* * *

[Filed January 15, 1998]

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, VS. MICHAEL L. MARSH, II, Defendant.	)	CASE NO. 96 CR 1157

INSTRUCTIONS

Given by

JUDGE CLARK V. OWENS II

APPEARANCES:

For the State of Kansas: James E. Puntch, Jr.
Kevin O'Connor
Assistant District Attorneys
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Wichita, Kansas 67203

For the Defendant: Ronald E. Wurtz
Jeffrey A. Moots
Death Penalty Defense Unit
112 S.W. 6th Street, Suite 302
Topeka, Kansas 66603

INSTRUCTION NO. 1

Members of the Jury: It is my duty to instruct you in the law that applies to this case and it is your duty to follow all of the instructions. You must not single out one or more instruction and disregard others. You should construe each instruction in the light of and in harmony with the other instructions, and you should decide the sentence by applying the law to the facts as you find them. The order in which the instructions are given is no indication of their relative importance.

At times during the trial, the Court has ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to the facts or as to what your verdict should be by anything that I have said or done.

Your verdict must be founded upon the evidence admitted and the law as given in these instructions. It cannot be based upon any other consideration whatsoever.

In your determination of sentence you should consider and weigh everything admitted into evidence from the guilt phase or penalty phase of this trial that bears on an aggravating or mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

INSTRUCTION NO. 2

The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

INSTRUCTION NO. 3

In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person. and/or

2. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution. and/or

3. That the defendant committed the crime in an especially heinous, atrocious or cruel manner. The term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

A crime is committed in an especially heinous, atrocious, or cruel manner where the perpetrator inflicts serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.

INSTRUCTION NO. 4

A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

The defendant contends that mitigating circumstances include but are not limited to the following factors and you must review each for consideration:

1. The defendant has no significant history of prior criminal activity.
2. The crime was committed while the defendant was under the influence of mental or emotional disturbance.
3. The defendant acted under distress or under the domination of another person.
4. The age of the defendant at the time of the crime.
5. The defendant was not the sole cause of the death of Marry Elizabeth Pusch, rather the unlawful or improper administration of drugs contributed to her death.
6. Another person shares significantly in the guilt of the crime of capital murder.
7. The defendant's emotional immaturity.
8. The defendant's expressions of remorse.
9. The defendant's acceptance of responsibility for the crimes.
10. While in high school Michael Marsh saved the life of his friend, Michael Unruh.
11. The execution of Michael Marsh would have a devastating emotional effect on his friends.
12. Michael Marsh has relationships with people who care deeply for him.
13. Michael Marsh's has a history of emotional difficulty as demonstrated by his history of self-injury and hospitalization in California.
14. Michael Marsh was not the sole participant in the crimes committed at 1749 South Washington on June 17, 1996.
15. Michael Marsh's behavior during the trial.

16. Michael Marsh confessed to involvement in the crimes of which he was convicted.

17. Michael Marsh is a talented artist.

18. Any other circumstance which is found, in fairness or mercy, may serve as a basis for a sentence other than death.

Each juror must consider every mitigating factor that he or she individually finds to exist.

INSTRUCTION NO. 5

The State has the burden to prove to you beyond a reasonable doubt that there are one or more aggravating circumstances. If you find that one or more aggravating circumstances have been so proven, the State must then prove beyond a reasonable doubt that they are not outweighed by any mitigating circumstances.

INSTRUCTION NO. 6

In making the determination whether aggravating circumstances exist that are not outweighed by any mitigating circumstances, you should keep in mind that your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

INSTRUCTION NO. 7

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

INSTRUCTION NO. 8

You should not consider the fact that the defendant did not testify in arriving at your verdict.

INSTRUCTION NO. 9

The defendant is entitled to the individual opinion of each juror. Each of you must consider the evidence for the

purpose of reaching a verdict. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. Do not decide any question in a particular way simply because the majority of jurors, or any of them, favor such a decision.

INSTRUCTION NO. 10

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the verdict form with particularity the aggravating circumstances which you found beyond a reasonable doubt.

If you have a reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances, then you shall so indicate on your verdict form, and defendant will not be sentenced to death but will be sentenced by the court as provided by law.

INSTRUCTION NO. 11

At the conclusion of your deliberations you shall sign the verdict form upon which you agree.

The verdict forms provide the following alternative verdicts:

A. Finding beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, and sentencing the defendant to death;

OR

B. Reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances and sentencing the defendant to life imprisonment with parole eligibility set by the Court at either 25 years or 40 years.

INSTRUCTION NO. 12

The presiding juror will continue to preside over your deliberations in this proceeding. He will speak for the jury in court, and will sign the verdict you agree upon.

In order to reach a verdict in this case, your decision must be unanimous. If the jury after reasonable deliberation is unable to reach a unanimous verdict, you shall so notify the Court and it will be a final decision and the defendant will not be sentenced to death but will be sentenced by the court as provided by law to life imprisonment with parole eligibility set by the court at either 25 years or 40 years.

You will now listen to the arguments of counsel whose right it is to discuss the evidence and the law. Statements, arguments and remarks of counsel are intended to help you in understanding the evidence and applying the law but they are not evidence. If any statements are made that you believe are not supported by evidence, they should be disregarded.

January 9, 1998
Date

/s/ Clark V. Owens II
Clark V. Owens II
District Judge

[Filed January 12, 1998]

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, VS. MICHAEL L. MARSH, II, Defendant.	)	CASE NO. 96 CR 1157

VERDICT

We, the Jury, impaneled and sworn, do upon our oath, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist. (The Presideing Juror shall place an "X" in front of such aggravating cirumstance(s).

__X__ 1. That the defendant knowingly or purposely killed or created a great risk of death ot more than on person.

__X__ 2. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

__X__ 3. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

and so, therefore, unanimously sentence the defendant to death.

/s/ Kenneth J. Thompson
Presiding Juror

Date of this Verdict: January 12, 1998.

[Filed March 29, 2001]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS Plaintiff-Appellee	)	
vs.	)	District Court Case No: 96CR1157
MICHAEL L. MARSH II Defendant-Appellant	)	Appellate Court No: 98-81135-S

MOTION FOR STAY OR, IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO FILE BRIEF

Comes Now the defendant-appellant, Michael L. Marsh II, and moves this Court for a stay of the brief due date pending this Court's decision in State of Kansas v. Gary W. Kleypas, No. 98-80920-S or, in the alternative, for an extension of time to file the brief in the present case. In support of this motion, the following is stated:

1. On March 27, 2001, this Court denied Mr. Marsh's motion for reconsideration of its previous order directing appellant to file a brief not to exceed 200 pages, and further denied Mr. Marsh's motion for permission to file a brief not to exceed 475 pages.

2. The brief in this case is presently due on March 30, 2001.

3. Counsel, of course, has no choice but to comply with the Court's order directing appellant to file a brief not to exceed 200 pages. This will be a difficult, time consuming process, requiring counsel to determine the best way in which to set forth the facts and arguments competently and adequately within the 200-page limit while at the same time

protecting Mr. Marsh's constitutional rights to due process, equal protection, and the effective assistance of counsel under the 6th and 14th Amendments. See Smith v. Robbins, 528 U.S. 259, 276, 145 L.Ed.2d 756, 120 S.Ct. 746 (2000) (indigent defendants entitled to adequate and effective appellate review under Due Process Clause and Equal Protection Clause of the 14th Amendment) (citing Griffen v. Illinois, 351 U.S. 12, 20, 100 L.Ed. 891, 76 S.Ct. 585 (1956)); Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985); Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

4. In the original Brief of Appellant which was provisionally filed on February 26, 2001, and rejected by this Court on March 1, 2001, twenty-one issues are raised which are common to the appeal in State v. Kleypas, which was argued on December 6, 2000, and is awaiting decision by this Court. This Court's decision on these issues in Kleypas will control the disposition of those issues in the present case. Consequently, a stay of the brief due date in the present case pending this Court's decision in Kleypas will alleviate the need to extensively brief the issues in this case which are common with those raised in Kleypas, and may even eliminate the need to raise some of those issues in the brief in the present case. Accordingly, counsel requests that the brief due date in this case be stayed pending this Court's decision in Kleypas.

5. In the alternative, because of the amount of additional work which will be necessary in order for counsel to comply with the Court's order to file a brief not to exceed 200 pages and still protect Mr. Marsh's constitutional rights to due process and to the effective assistance of counsel, if this Court decides that a stay of the brief due date pending a decision in Kleypas is not warranted, counsel needs an additional sixty (60) days in which to copmlete the brief on appeal.

WHEREFORE, counsel respectfully requests that this Court stay the brief due date pending its decision in State v. Kleypas or, in the alternative, for an extension of time of sixty (60) days until May 29, 2001, to complete the brief in the present case.

Respectfully submitted,

/s/ Rebecca E. Woodman
Rebecca E. Woodman #13393
Assistant Appellate Defender
700 Jackson, Suite 903
Topeka, KS 66603
(785) 296-5484

Attorney for Michael L. Marsh II

SUPREME COURT ORDER DISTRICT CASE NO. 96CF1157
[Dated April 12, 2001]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Jessica R Kunen
Chief Appellate Defender
700 Jackson
Topeka KS 66603-3740

STATE OF KANSAS, Appellee, V. MICHAEL LEE MARSH, II, Appellant.	)	CASE NO: 98-81135-S

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

Motion for Stay or in the Alternative, Motion for Extension of Time to File Brief by Appellant, Michael Marsh.

GRANTED IN PART. The briefing schedule is hereby stayed. Appellant's brief is due on or before 60 days after decision date of the State v. Kleypas decision. Response noted.

Date: 04/12/2001.

Carol G. Green
Clerk

[Received March 8, 2002]

No. 98-81135-S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MICHAEL L. MARSH II
Defendant-Appellant

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURTOF
SEDGWICK COUNTY, KANSAS
HONORABLE CLARK V OWENS, JUDGE
DISTRICT COURT CASE NO. 96CR1157

Rebecca E. Woodman #13393
Assistant Appellate Defender
Appellate Defender Office
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Attorney for the Appellant

* * *

PENALTY PHASE/SENTENCING REVIEW

Issue 19: Because Mr. Marsh's death sentence was determined pursuant to the same weighing equation under K.S.A. 21-4624(e) which this Court found unconstitutional in State v. Kleypas, his death sentence must be set aside.

In State v. Kleypas, slip op. at 149-168, this Court held that the weighing equation under K.S.A. 21-4624(e), which mandates a death sentence if the aggravating and mitigating circumstances are in equipoise, violates the 8th and 14th Amendments. Because this unconstitutional weighing equation was applied in Mr. Marsh's case, over defense counsel's objection (R. 5, 450-451; R. 8, 780-786; R. 12, 1196-1197, 1201-1202; R. 27, 42), Mr. Marsh's death sentence must be vacated and, at the very least, his case must be remanded for a new penalty phase hearing. See Id., slip op. at 172.

Nevertheless, the disposition in Kleypas, which reconstructed K.S.A. 21-4624(e) in a constitutional manner, is contrary to the proper disposition specifically set forth in K.S.A. 21-4629, and also violates well-established rules of statutory construction. For these reasons, the proper disposition of this case is to set aside Mr. Marsh's death sentence, and remand his case for resentencing to a life sentence.

First, the Kansas legislature has expressly set forth the proper disposition of this case in K.S.A. 21-4629, which provides: "In the event a sentence of death *or any provision of this act authorizing such sentence* is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence

and resentence the defendant as otherwise provided by law". (Emphasis added). This statute was neither cited nor discussed in the Kleypas opinion.

This Court's finding in Kleypas that the weighing equation contained in K.S.A. 21-4624(e) violates the 8th and 14th Amendments is a finding that a central provision of the act which authorized the death sentence imposed against Mr. Marsh in this case is unconstitutional. K.S.A. 21-4629 does not require a finding that the entire statutory scheme for imposing a death sentence is unconstitutional, only that "any provision of this act authorizing such sentence" be held to be unconstitutional. The weighing equation clearly is such a provision. Accordingly, the disposition mandated by that statute applies in this case. See Hicks v. Oklahoma, 447 U.S. at 346(defendant has liberty interest, secure under the due process clause of 14th Amendment, in a right provided by a state statute).

Under the plain language of K.S.A. 21-4629, the death sentence imposed against Mr. Marsh must be vacated and the case remanded to the district court with directions to "resentence the defendant as otherwise provided by law", that is, to a life sentence.

Second, the Court's rewriting of the weighing equation is contrary to well established rules of statutory construction and violates the doctrine of separation of powers. See Kleypas, slip op. at 168-172 (while finding that weighing equation in K.S.A. 21-4624(e) is unconstitutional under the 8th and 14th Amendments, the Court in Kleypas nevertheless held that the statute is not unconstitutional "on its face" and proceeded to construe the statute in a manner deemed constitutional).

In Hearn v. City of Overland Park, 244 Kan. 638 (1989), the Court stated that an ordinance is unconstitutional "on its face" when it is "invalid *in toto* -- and therefore incapable of any valid application." 244 Kan. at 641, quoting Hoffman

Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 n.5 (1982). Given this Court's finding that "[w]e see no way that the weighing equation in K.S.A. 21-4624(e) ... is permissible under the Eighth and Fourteen Amendments" (slip op. at 168), the "tie goes to the state"weighing equation is incapable of any valid application; the weighing equation as set forth by the legislature simply cannot be applied in a constitutionally valid manner. Hence, the statute *is* invalid on its face, and this Court's attempt in Kleypas to construe it in a constitutional manner is unwarranted.

The rule that a statute may be construed in a constitutional manner by "reading the necessary judicial requirements into the statute" (slip op. at 170) is applicable when addressing statutes which are overbroad or vague. See, e.g., State v. Huffman, 228 Kan. 186 (1980); State v. Motion Picture Entitled "The Bet", 219 Kan. 64, 70 (1976). See generally Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. at 494. This rule, however, cannot be applied to a statute which is plain and unambiguous. There is a marked distinction between construing a nebulous term like "obscenity" in a specific manner and in construing precise words to mean the exact opposite of what they actually say. In Harris v. Shanahan, 192 Kan. 183, 195-196 (1963), the Court stated: "This court has the power to declare a legislative act invalid when it infringes the superior law, but it has no power to correct or amend an act, or even construe it when expressed in plain and unambiguous language. The general rule is that where the statute is plain and unambiguous, there is no room left for judicial construction so as to change the language employed therein." The Court's reconstruction of the unambiguous language used in the weighing equation set forth in K.S.A. 21-4624(e) violates this basic rule.

Further, even when the use of vague or overbroad language in a statute warrants judicial interpretation, such an interpretation is appropriate only "when it can be done

within the apparent intent of the legislature in passing the statute". (Slip op. at 171, quoting State v. Durrant, 244 Kan. 522, 534-535 (1989)). In addressing legislative intent, the Court simply states: "The legislative intent in passing the death penalty act is obvious." (Slip op. at 171). Yet, as Justice Davis aptly notes in his dissenting opinion in Kleypas, the legislature intended to include the precise weighing equation which the majority of the Court found violated the 8th Amendment. (Slip op. at 314-315) As both the Court's majority opinion and Justice Davis' dissenting opinion in Kleypas acknowledged, the Attorney General advised the legislature of the pending constitutional challenge to the "tie goes to the state" weighing equation and suggested that the statute be amended to provide that a "tie goes to the defendant". (Slip op. 167, 314). Despite this recommendation, the legislature chose to use the specific weighing equation set forth in K.S.A. 21-4624(e). In light of such a knowing and conscious decision by the legislature, the presumption that the legislature intended to pass a constitutional statute cannot be applied. Under these circumstances, the Court's unauthorized rewriting of the statute violates the separation of powers, which in turn violates the guarantee of a republican form of government as set forth in clause of Article IV, section 4 of the United States Constitution. See Van Sickle v. Shanahan, 212 Kan. 426, 447 (1973).

For the reasons set forth herein, the rules of construction applied by the Court in Kleypas cannot be employed given the unambiguous language used in the statute and the evidence that the legislature intentionally chose to use that language. Accordingly, that part of the Kleypas decision must be overruled.

* * *

[Received January 7, 2003]

No. 98-81135-S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff / Appellee

v.

MICHAEL L. MARSH II
Defendant / Appellant

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF
SEDGWICK COUNTY, KANSAS
THE HONORABLE CLARK V. OWENS
DISTRICT COURT JUDGE ASSIGNED
DISTRICT COURT CASE NO. 96-CR-1157

Kristafer Ailslieger, #19626
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* * *

XIX. The State concedes that under *State v. Kleypas*, Defendant's death sentence must be vacated and his case remanded for resentencing under K.S.A. 21-4624(e) as construed by this Court.

Under the heading of issue 19, Defendant actually raises three separate issues: (1) under *State v. Kleypas, supra*, his death sentence must be vacated, (2) under K.S.A. 21-4629, he cannot be resentenced to death, and (3) this Court's construction of K.S.A. 21-4624(e) was erroneous and violated the doctrine of separation of powers. Each of these sub-issues will be addressed separately below.

A. Under *State v. Kleypas*, Defendant's death sentence must be vacated and his case remanded for resentencing.

In *Kleypas, supra*, this Court found the application of the weighing equation in K.S.A. 21-4624(e) with respect to aggravating and mitigating factors to be unconstitutional when such application could result in the imposition of a death sentence when the aggravators and mitigators were found to be in equipoise. 40 P.3d at 232. Because Defendant's death sentence was imposed as a result of the same unconstitutional application of K.S.A. 21-4624(e) as occurred in *Kleypas*, the State concedes that his sentence must be set aside and his case remanded for resentencing in accordance with the *Kleypas* decision. 40 P.3d at 234.

B. K.S.A. 21-4629 does not prevent the re-imposition of the death penalty following a second penalty hearing before a jury.

Standard of Review

Interpretation of a statute is a question of law over which this Court exercises *de novo* review. *State v. Lewis*, 263 Kan. 843, 847 (1998).

Argument

Defendant's argument is based on an overly literal interpretation of K.S.A. 21-4629. However, he misses the purpose of the statute and the substance of the *Kleypas* decision. K.S.A. 21-4629 exists as a safety net to provide direction in the event that the death penalty is found to be unconstitutional. However, the *Kleypas* Court did not determine that the death penalty was unconstitutional, it only determined that the weighing equation used by the jury to determine the appropriateness of the death penalty in that particular case was unconstitutional. The *Kleypas* Court neither held that the sentence of death was *per se* unconstitutional, nor that the statute authorizing it, K.S.A. 21-4624, was unconstitutional. The *Kleypas* Court held only that the particular *application* of K.S.A. 21-4624(e) that led to the imposition of the death penalty in that case was unconstitutional. However, the death penalty itself remains a valid, constitutional option under Kansas law. Therefore, K.S.A. 21-4629 is inapplicable.

However, even if K.S.A. 21-4629 were to apply to this situation, it does not prohibit the re-imposition of the death penalty. It states that the sentencing court shall "resentence the defendant as otherwise provided by law." Because the death sentence remains a sentence "provided by law" in Kansas, K.S.A. 21-4629 does not act as a bar to a second imposition of the same sentence if a jury finds it to be appropriate.

Defendant's citation to *Hicks v. Oklahoma*, 447 U.S. 343 (1980) is misplaced. It is so factually and legally dissimilar as to be completely inapposite. In *Hicks*, a defendant was sentenced to a mandatory 40 year term in accordance with a habitual violator statute that was later determined to be unconstitutional. 447 U.S. at 344-45. The Oklahoma courts subsequently affirmed his sentence, however, because it was still within the range permissible for his crime. 447 U.S. at

345. On review, the Supreme Court held that affirming the sentence violated the defendant's due process rights because it denied him the possibility that, absent the unconstitutional mandatory minimum, a jury might have returned a lesser sentence. 447 U.S. at 347. This is in no way applicable to the present case. On remand, the fu'l range of sentencing options applicable to Defendant's crime of conviction remains available.

C. This Court's construction of K.S.A. 21-4624(e) in *State v. Kleypas* was within the Court's lawful authority and did not violate the separation of powers doctrine.

Standard of Review

The constitutionality of a statute is a question of law over which this Court exercises *de novo* review. *State v. Kleypas*, 40 P.3d 139, 224 (2001). Logic dictates that review of the Court's own prior decision on the constitutionality of statute is likewise de novo.

Argument

Defendant misapprehends this Court's reasoning in *Kleypas* to conclude that, in spite of this Court's statement otherwise, K.S.A. 21-4624(e) is unconstitutional on its face. This Court clearly held that K.S.A. 21-4624(e) is not unconstitutional on its face. 40 P.3d at 232. Rather, the Court found that the application of K.S.A. 21-4624(e) under circumstances which could result in the imposition of a death sentence when the aggravators and mitigators were found to be in equipoise was unconstitutional. 40 P.3d at 232. The Court then proceeded to construe the statute so that it could not be applied in such an unconstitutional manner in the future. 40 P.3d at 232-34.

As originally written, K.S.A. 21-4624(e) allowed the imposition of the death penalty when (a) the jury found the aggravating factors outweighed the mitigating factors, and (b) when the jury found the aggravating factors and the mitigating factors were in equipoise. This Court found the

first situation to be constitutional, but the latter to be unconstitutional. Therefore, any application of the statute in which the latter situation was a possibility would be unconstitutional. That is what happened in *Kleypas*. Because there was the *possibility* that the aggravators and mitigators were in equipoise (although there is no way of knowing), the application of the statute was unconstitutional in that instance. The same is true in the present case.

However, that does not mean the statute is unconstitutional *in toto* as suggested by Defendant. It is still constitutional to impose the death penalty under K.S.A. 21-4624 when there is a jury finding that the aggravators outweigh the mitigators. That was the case before *Kleypas*, and it remains the case. The only effect of the *Kleypas* decision was the elimination of the possibility of imposition of the death penalty when the aggravators and mitigators are in equipoise. This did not require a substantial re-writing of the statute, nor did it usurp the role of the legislature. It simply required the Court, under its authority as the supreme arbiter of state law, to exercise its duty to reasonably construe statutes in such a way as to uphold their constitutionality and meet the intent of the legislature.

The *Kleypas* Court did not engage in any type of unprincipled legislation from the bench, but rather followed established rules of construction and case law. *See State v. Durrant*, 244 Kan. 522 (1982); *In re Adoption of Baby Boy L.*, 231 Kan. 199 (1982); *State v. Motion Picture Entitled "The Bet,"* 219 Kan. 64 (1976); *State v. Gunzelman*, 210 Kan. 481 (1972); *State v. Hart*, 200 Kan. 153 (1967). While the State obviously desired a somewhat different result in *Kleypas*, the State cannot take issue with the *Kleypas* Court's explanation for its authority to construe the statute as it did. It cannot be said that the *Kleypas* Court acted outside of its authority or violated the doctrine of separation of powers. The legislature intended to enact a death penalty statute, and the Court simply construed the statute to meet that intent in a

manner determined necessary by the Court to meet constitutional requirements. Defendant's arguments that the Court engaged in an unauthorized rewriting of the statute, and that the entire statute is unconstitutional on its face, are without merit.

XX. The State concedes that under *State v. Kleypas*, the penalty phase verdict form suggesting that the jury must be unanimous in a decision to impose a life sentence rather than death was erroneous and requires reversal of Defendant's death sentence.

The State concedes that the penalty phase verdict form applying to the imposition of a life sentence (R. Vol. 12, p. 1204) incorrectly advised the jury that a decision to impose such a sentence must be unanimous. Under *Kleypas*, this error requires vacating Defendant's death sentence and remanding for a new penalty phase. 40 P.3d at 260.

* * *

[Filed December 29, 2004]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,

Plaintiff / Appellee,

v. Case No: 98-81135-S

MICHAEL LEE MARSH, II,

Defendant / Appellant.

MOTION FOR REHEARING

APPEARS NOW the State of Kansas, by and through Phill Kline, Attorney General, and Kristafer R. Ailslieger, Assistant Attorney General, and respectfully moves for a rehearing in the above-captioned matter in order to address the applicability of the severability provision of K.S.A. 21-4630 to K.S.A. 21-4624 (the death penalty statute), and whether application of K.S.A. 21-4630 will allow the unconstitutional "equipoise" provision to be severed and the remaining constitutional provisions of the death penalty statute be given effect. In support of this motion, the State submits the following:

[1.] In its opinion released on December 17, 2004, in which this Court determined that the Kansas death penalty statute (K.S.A. 21-4624) was unconstitutional on its face, neither the majority nor any of the dissents addressed the applicability of the severability provision of K.S.A. 21-4630.

[2.] The State submits that with proper application of K.S.A. 21-4630, the unconstitutional "equipoise" provision can be eliminated from the death penalty statute and the remaining statutory language can be given effect without

violating the United States Constitution, consistent with the intent of the Kansas Legislature and the will of the people of Kansas.

[3.]K.S.A. 21-4630 provides:

> If any provisions of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

[4.]The State contends that, by application of K.S.A. 21-4630, the provision of K.S.A. 21-4624 imposing the death sentence when the jury finds the aggravating and mitigating factors in equipoise, can be severed without rewriting the statute or invading the province of the legislature, and that the remaining statutory provisions can be given effect consistent with the United States Constitution and the clear legislative intent. By striking three words and a suffix -- a grand total of nine letters -- from K.S.A. 21-4624(e), the unconstitutional provision can be eliminated and the remaining constitutionally sound provisions can be given effect.

[5.]K.S.A. 21-4624(e) reads, in pertinent part, "If, by unanimous vote, the jury finds . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death." The effect of this, as this Court is well aware, is that if the jury determines the aggravating and mitigating factors are equal, the defendant shall be sentenced to death. This Court has determined this "equipoise" provision to be unconstitutional.[1] However, this does not require the

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[1]The State still holds the position that the statute as written is constitutional, but for the sake of this Motion for Rehearing, the State

invalidation of the entire death penalty statute because K.S.A. 21-4630 allows for the severance of unconstitutional provisions in order to give effect to the constitutional provisions. By striking the words "is not," the suffix "-ed" from the word "outweighed," and the word "by," the equipoise provision can be eliminated while the rest of the statute remains intact.[2] The statute would thus read, in pertinent part, "If, by unanimous vote, the jury finds . . . that the existence of such aggravating circumstances outweigh any mitigating circumstances which are found to exist, the defendant shall be sentenced to death." Thus, by striking, **not rewriting**, words in the statute, the equipoise provision can be eliminated while the remaining provisions of the statute, and the intent of the legislature and the people of Kansas can be given effect consistent with the United States Constitution.

[6.] There is substantial case law supporting this approach. This Court has long recognized that "[t]he general doctrine is that only the invalid parts of a statute are

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accepts this Court's interpretation to the contrary. The State did not argue for the constitutionality of the statute as written in its brief because at the time, *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001),was controlling law, and had been resolved contrary to the State's position. The State did not believe it was appropriate to raise an argument before this Court which it had already been squarely considered and decided only a matter of months earlier, with no intervening change in the law. However, this should not be viewed as a concession of the issue. The State could not reasonably foresee that this Court would overrule *Kleypas*. Should this Motion for Rehearing be denied, or should the Court uphold its present ruling upon rehearing, the State still intends to seek review by the United States Supreme Court, challenging this Court's determination that the weighing equation in K.S.A. 21-4624 violates the United States Constitution.

[2] "If, by unanimous vote, the jury finds . . . that the existence of such aggravating circumstances ~~is not~~ outweigh~~ed by~~ any mitigating circumstances which are found to exist, the defendant shall be sentenced to death."

without legal efficacy." *State v. Smiley*, 65 Kan. 240, 247, 69 P. 199 (1902). "Where parts of a statute or a section of a statute can be readily separated, then the part which is constitutional may stand while the unconstitutional part is rejected. *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 316, 955 P.2d 1136 (1998) (citing *Voran v. Wright*, 129 Kan. 601, Syl. ¶ 6, 284 P. 807 (1930)). Application of this rule occurs most often "where separable words, clauses, sentences, or sections of the statute are stricken out . . . because [they are] constitutionally objectionable." *Smiley*, 65 Kan. at 248. However, the rule applies as well "to exclude parts of the verbal phraseology." *Id.* The only caveat to this rule is that "if the void and valid parts of the statute are so connected with each other in the general scheme of the act that they cannot be separated without violence to the evident intent of the legislature, the whole must fall." *Id.* at 247. Here, there can be no serious contention that striking the words proposed by the State, and thus eliminating the unconstitutional equipoise provision from the statute, will do violence to the clear intent of the Kansas legislature to enact an effective and constitutional death penalty, especially when the legislature expressly included a severability provision. Accordingly, the severability doctrine should apply.

[7.] A court does not invade the province of the legislature by striking from a statute language which creates an unconstitutional provision or application. This Court long ago acknowledged:

> Throughout the entire history of English and American law the courts have been ruling that the general words of statutes were to be restrained in import and application whenever the taking of them in literal sense would lead to absurd or hurtful consequences, and the same is true under the

> American system of written constitutions, whenever the taking of general words in their full signification would expose them to conflict with the organic law. It is but an affectation of sensitiveness of regard for the constitution which often leads courts to beat down the whole of a legislative enactment because of its opposition to the fundamental ordinance in some minor particular, instead of adjusting it to harmonize with the controlling provision.

Smiley, 65 Kan. at 249-250. Further, the *Smiley* Court noted:

> If the intention of any part of the act, determined upon settled principles of legal interpretation, were to obstruct or impede the exercise or enjoyment of any right secured by the constitution of the United States, or by any constitutional law of the United States, that part would be unconstitutional. But if the intention thus determined were merely to establish, regulate, or guarantee rights or privileges consistent with the constitution and laws of the United States, in a mode not in conflict with either, and if the act would constitutionally apply to a large class of cases that do and will exist, it would not be rendered unconstitutional by the fact that, literally construed, its language might be broad enough to extend to a few exceptional cases where it could not constitutionally apply; since, upon settled principles of construction, the latter are as fully and effectively excepted by necessary implication, as if the statute had contained an express proviso that it should not extend or apply to such cases. *The rule of construction universally adopted is that, when a statute may constitutionally operate upon certain persons, or in certain cases, and was not*

> *evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that the courts are bound to presume that the legislature did not intend to violate the constitution.*

Id. at 250-51 (citation omitted) (emphasis added). This is directly applicable to the death penalty statute at issue -- this Court held it to be unconstitutional *in toto* on the basis that it could not constitutionally be applied in the extremely unlikely event that all twelve members of a penalty-phase jury determined that the aggravating and mitigating factors were in equipoise, in spite of the fact that in the vast majority of cases, the statute could and would be applied in a constitutional fashion, and that the legislature clearly intended to enact a constitutional death penalty. This ruling directly contravenes the rule cited above, espoused by this Court over 100 years ago. Moreover, lest one suggest that the principles articulated in *Smiley* are anachronistic and outdated, the same rule quoted above was reiterated by this Court as recently as 1985. *State v. Barclay*, 238 Kan. 148, 708 P.2d 972 (quoting with favor *Smiley*, 65 Kan. at 250-51).

[8.] Modern application of the severability doctrine holds:

> Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that the act would have been passed without the objectional (sic) portion and if the statute would operate effectively to carry out the intention of the

legislature with such portion stricken, the remainder of the valid law will stand.

Thompson v. KFB Ins. Co., 252 Kan. 1010, 1023, 850 P.2d 773 (1993). Here, there can be no doubt that the Kansas legislature fully supported the death penalty and intended to enact a constitutional death penalty. It is questionable whether the legislature fully understood the nuances of the weighing equation and there is no indication that it gave particular concern to the exact wording of the weighing provision. It would be quite dubious to suggest that the legislature's support for the death penalty hinged on insuring that the weighing provision provided for the death penalty when the aggravators and mitigators were in equipoise. On the contrary, the only reasonable conclusion is that the Kansas legislature would have passed the death penalty statute even if the weighing provision did not include the words "is not outweighed by," and rather, simply said "outweigh." Eliminating the objectionable language from the death penalty does not change the scope of the death penalty law or violate the legislative intent.

[9.] That the legislature failed to change the law upon the attorney general's suggestion in 1995 does not undermine the State's position that striking the offending language will not do violence to the legislative intent. It has been mis-stated, both in *Kleypas* and in the present matter, that "The legislature rejected that suggestion of the attorney general and adopted our present statute." *State v. Marsh*, Slip op. at 36 (quoting *Kleypas*, Davis, J., dissenting); *Kleypas*, 272 Kan. at 1124 (Davis, J., dissenting). In actuality, the legislature adopted the present statute first (in 1994), and the attorney general's subsequent suggestion, contained in a broader proposal of changes to the statute (HB 2532) failed to reach a vote by the legislature as a whole. Thus, it cannot be said that the legislature was informed of the potential

constitutional infirmity in the weighing equation prior to enacting the statute and chose to enact it anyway, nor can it be said that the legislature affirmatively rejected the attorney general's suggestion to change the weighing equation because the full legislature never considered it.

[a.] At the time of enactment, the legislature simply lifted the words of the Hard 40 statute and created the present death penalty statute. Every indication is that the legislature intended to enact a constitutional death penalty, but there is no indication that the legislature specifically intended that in whatever form the death penalty was enacted, it absolutely had to provide for the death penalty when the aggravators and mitigators were equal, and that without such a provision, the legislature would not have enacted a death penalty.

[b.] That the legislature did not change the statute at the attorney general's suggestion is not indicative of a coherent desire to retain the equipoise provision. It must be recognized that House Bill 2532, which contained the attorney general's suggested change to the weighing equation, also contained multiple other proposed changes which included lowering the age of those eligible for the death penalty to 16, expanding the scope of crimes for which the death penalty would be available, increasing the time allowed for prosecutors to file notice of intent to seek the death penalty, and expanding the list of statutory aggravating factors. The bill was not limited to changing the weighing equation, and opposition to any of the many other proposed changes could explain why the bill never made it out of committee. One simply cannot conclude that the failure of this bill was because the legislature rejected the proposed change in the weighing equation. Further, because the suggested changes were never considered and voted on by the full legislature, the failure to change the law cannot be construed as demonstrative of the legislature's intent that the

equipoise provision be retained. Thus, the only truly clear legislative intent is that in 1994, the legislature intended to enact a constitutional death penalty, and intended that any provisions or application later found to be unconstitutional would be severed to save the constitutionality of the death penalty itself.

[10.] Application of the severability provision comports with this Court's long standing rules that "the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the Constitution. Moreover, *it is the court's duty to uphold a statute under attack, whenever possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done*." *Barclay*, 238 Kan. at 153 (citations omitted) (emphasis added).

[11.] In this instance, there is clearly a reasonable way to construe the statute as constitutionally valid by application of the well-recognized action of striking the offending language, consistent not only with rules recognized by this Court for more than a century, but also in accordance with the severability provision expressly provided for by the legislature.

[12.] Applying the severability doctrine to render the statute constitutional is not the same as applying the avoidance doctrine which this Court rejected in its decision in this case. The severability doctrine is distinctly different, and significantly, is not tied to whether the statute is vague and ambiguous. Rather, the severability doctrine is only concerned with whether the objectionable language can be stricken from the statute without wreaking a major change in the scope of the law or doing violence to the legislative intent.

[13.] That this is an important case of great public interest is obvious, and the fact that it is such a significant case further weighs in favor of rehearing in order to insure that every argument is considered and that the public retains trust in the criminal justice system as thorough, rational, and committed to full legal resolution of important issues. Further, the impact of this Court's decision in this case is not limited only to those death sentences imposed prior to *Kleypas*, but also has the anomalous effect of invalidating those subsequent to *Kleypas* which were clearly imposed in a constitutional matter.[3] The decision also affects several current capital prosecutions in which the death penalty is being sought by the State. These are all cases of great public interest both to the state as a whole, and to the individual communities where the crimes took place. While neither the great public interest, nor the anomalous effect on otherwise constitutional death sentences, nor the impact on current and future prosecutions override constitutional principles, all militate in favor of rehearing to consider this possible avenue of saving this duly enacted law that still enjoys widespread support from a majority of the people of Kansas.

[14.] As neither the majority opinion nor the dissenting opinions discuss, or even mention the severability statute, it appears that this provision has been overlooked.[4] Given this, along with the obvious importance of this case and substantial public interest, coupled with this Court's duty to uphold a statute under attack whenever possible, the State respectfully suggests

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[3] In accordance with *Kleypas*, all subsequent death penalty juries were instructed that the aggravators had to outweigh the mitigators

[4] The applicability of the severability provision was not raised in the State's brief because at the time, *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), was still controlling law and its holding obviated the need for any such severability discussion.

that a rehearing to address this particular issue is not only necessary, but compelled.

WHEREFORE, for the foregoing reasons, the State respectfully requests that this Court grant its motion, and schedule a rehearing in the above-captioned matter.

Respectfully submitted,

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[Filed January 6, 2005]

IN THE SUPREME COURT OF
THE STATE OF KANSAS

STATE OF KANSAS Plaintiff-Appellee	)	
	)	District Court Case No. 96CR1157
vs.	)	Appellate Court No. 98-81135-S
MICHAEL L. MARSH II Defendant-Appellant	)	

RESPONSE TO STATE'S MOTION FOR REHEARING

Comes Now the defendant, Michael L. Marsh, by and through Rebecca E. Woodman, Capital Appellate Defender, and responds to the state's motion for rehearing in the above-captioned case, as follows:

1. In its motion, the state argues that the severability provision set forth in K.S.A. 21-4630 can be employed to "save" K.S.A. 21-4624(e) "without rewriting the statute or invading the province of the legislature." (Motion for Rehearing, at 2.) The state's argument aptly illustrates why the Court's decision in this case was correct. Despite its claim to the contrary, the state's argument constitutes the same rewrite of the plain and unambiguous language of K.S.A. 21-4624(e), which this Court rightfully held could not be done consistent with fundamental rules of statutory construction and separation of powers, and thus required the Court to overrule the part of the decision in *State v. Kleypas* that saved the statute through judicial reconstruction. *State of Kansas v. Michael Lee Marsh II*, _____ Kan. _____, No. 81,135, slip op., at 30-39 (December 17, 2004) (overruling in part *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001)).

2. Under K.S.A. 21-4630, an invalid provision can be severed only when other provisions "can be given effect without the invalid provisions or application." This simply cannot be done with the unambiguous language of K.S.A. 21-4624(e), which mandates death if the jury, after finding the existence of one or more aggravating circumstances, finds that "the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." This provision is susceptible to only one construction: Under the plain and unambiguous language of K.S.A. 21-4624(e), the state is not required to prove, and the jury is not required to find, that the aggravating circumstances outweigh mitigating circumstances; a death sentence is mandated if the jury finds that the aggravating circumstances and mitigating circumstances are equally balanced. It is only if the jury finds that the mitigating circumstances outweigh the aggravating circumstances that the defendant receives a *life* sentence. As the Court in *Kleypas* found, and reaffirmed in this case, K.S.A. 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments, because it mandates death when aggravating and mitigating circumstances are in equipoise. *Marsh*, slip op. at 26-30 (reaffirming holding a *Kleypas*, 272 Kan. at 1015-1016).

3. There can be no constitutionally valid application of the plain and unambiguous language of K.S.A. 21-4624(e), and severance cannot apply, because there is no separate and independent provision from which it can be severed. See *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 339-340, 955 P.2d 1136 (1998); *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1023-1024, 850 P. 2d 773 (1993). It is a single statutory provision which the state is attempting to alter -- i.e., rewrite -- to mean the exact opposite of the express language enacted and intentionally chosen by the legislature. Not only is this contrary to the fundamental rules of statutory construction

set forth in this Court's decision in this case (*Marsh*, slip op. at 31 (quoting *State ex rel. Graeber v. Marion County Landfill, Inc.*, 276 Kan. 328, 339, 76 P. 3d 1000 (2003)), but it does violence to the legislative intent in the same way as did the Court's judicial rewrite of the statute in that part of *Kleypas* which was overruled in this case. *Marsh*, slip op. at 44. See *Thompson v. KFB Ins. Co.*, supra, 252 Kan. at 1023-1024 (severability inapplicable where result would violate legislative intent as expressed in language of statute).

4. The state's argument is also contrary to the disposition specifically provided by state statute, K.S.A. 21-4629, when any provision authorizing a death sentence is held unconstitutional by this Court. In that event, K.S.A. 21-4629 mandates that "the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence and resentence the defendant as otherwise provided by law," that is, to a life sentence.

WHEREFORE, for the foregoing reasons, Mr. Marsh requests that the state's Motion for Rehearing in this case be denied.

Respectfully submitted,

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[Received April 20, 1999]

No. 98-80920-S

IN THE
SUPREME COURT OF THE STATE
OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

GARY W. KLEYPAS
Defendant-Appellant

BRIEF OF APPELLANT
VOLUME III
SENTENCING REVIEW AND CONSTITUTIONAL CHALLENGES

Appeal from the District Court of Crawford County,
Kansas
Honorable Donald Noland, Judge
District Court Case No. 96 CR 240G

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* * *

Constitutional Challenges

Issue XLIV: K.S.A. 21-4624(e) is unconstitutional in violation of the 8th and 14th Amendments to the United States Constitution and §9 and §18 of the Kansas Bill of Rights, because it mandates a death sentence even if the jury is unable to decide whether aggravating circumstances outweigh mitigating circumstances; the statute creates a presumption of death and shifts the burden of proof to the defendant to prevent a death sentence.

K.S.A. 21-4624(e) provides, in pertinent part, as follows:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist *and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist*, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law. (Emphasis added.)

The language of K.S.A. 21-4624(e) thus requires a death sentence, not only when the jury finds that aggravating circumstances outweigh mitigating circumstances, but also when the jury decides that aggravators and mitigators are equally balanced, or is unable to decide one way or the other whether aggravating circumstances outweigh mitigating circumstances. Defense counsel filed a pretrial motion in this case, arguing that the weighing equation set forth in K.S.A. 21-4624 violates the state and federal constitutions because it mandates a death sentence if the aggravating and mitigation circumstances are in equipoise (R. 4, 821-822). The district court overruled the motion, finding that a Florida statutory scheme which "is quite similar to the method employed in Kansas" was approved by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 49

L.Ed.2d 913, 96 S.Ct. 2960 (1976), and further finding that "[i]ronically, it is the very thing that the defendant complains of – the weighing of the aggravating versus mitigating factors – that results in a constitutionally firm sentencing phase because the sentencer, through the weighing process, is both limited and guided in imposing sentence" (R. 4, 4, 5, 6). The district court did not address the fact that the statute mandates death even where the aggravating and mitigating circumstances are in equal balance, which was not an issue in Proffitt. See 428 U.S. 242. The jury was subsequently instructed in accordance with K.S.A. 21-4624(e), that it must impose a death sentence if it finds unanimously and beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances (R. 10, 2349). See also, P.I.K. Crim.3d 56.00-G and 56.00-H. The state emphasized to the jury during closing argument at the penalty phase that it must impose death even if the aggravating and mitigating factors are equally balanced (R. 71, 26-37, 62).

Contrary to the district court's finding, K.S.A. 21-4624(e) violates the federal and state constitutional prohibitions against cruel and/or unusual punishment and their guarantees of due process of law. See U.S. Const., 8th Amendment (prohibiting "cruel and unusual punishments"); Kansas Const., Bill of Rights §9(prohibiting "cruel or unusual punishment"); U.S. Const.,14th Amendment; Kansas Const., Bill of Rights §18(see State v. Thirty-six Pinball Machines, 222 Kan. 416, 419, 565 P.2d 236 (1977) (referring to §18 of the Kansas Bill of Rights as the due process clause of our state constitution)). K.S.A. 21-4624(e) violates the constitutional requisite of reliability in the determination that death is the appropriate sentence, and it creates an unconstitutional presumption of death that shifts the burden to the defendant to prove that he should not be sentenced to death.

Because of the qualitative difference between death and life imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976)(plurality opinion.) The sentence imposed at the penalty phase "'should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" Penry v. Lynaugh, 492 U.S. 302, 319, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989)(quoting California v. Brown, 479 U.S. 538, 545, 93 L.Ed.2d 934, 107 S.Ct. 837 (1987)(O'Connor, J., concurring).) It is the sentencing authority, in this case the jury, that must consciously decide whether a sentence of death is the appropriate, i.e., deserved, sentence for a particular offender. See People v. Drake, 748 P.2d 1237, 1257 (Colo. 1988)(citing, *inter alia*, Spaziano v. Florida, 468 U.S. 447, 457-465, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984); Zant v. Stephens, 462 U.S. 862, 890, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983)). Even the Florida death penalty statute, to which the district court looked in finding that K.S.A. 21-4624(e) was constitutional, contains a final step requiring the jury to determine, based upon its weighing of aggravating and mitigating circumstances, "whether the defendant should be sentenced to life imprisonment or death." See Fla.Stat.Ann. §921.141(2).

In Kansas, the jury is never asked to make a conscious determination of whether death is the appropriate punishment. Instead, K.S.A. 21-4624(e) simply mandates death even when the jury is unable to decide one way or the other whether aggravating circumstances outweigh mitigating circumstances. Consequently, any sentence of death imposed under K.S.A. 21-4624(e) is unreliable, and violates the 8th and 14th Amendments, because it cannot be said with any confidence that it is the appropriate punishment. See State v. Wood, 648 P.2d 71, 80-81(Utah 1982)("We reject the proposition that the death penalty may

be imposed when there is substantial doubt whether it should be. To accept that proposition would be to permit the sentencing authority to assume an almost casual attitude in imposing capital punishment -- the most solemn and final act that the state can take against an individual...the death penalty may be imposed only when consistent with 'the fundamental respect for humanity underlying the Eighth Amendment.' [Woodson, 428 U.S. at 304.] That can only be achieved if sentencing procedures only permit imposition of the death penalty on the basis of a high degree of confidence that the penalty is appropriate".) See also, State v. Holland, 777 P.2d 1019, 1026-1028 (Utah 1989)(holding trial court committed plain error in sentencing defendant to death by failing to find beyond a reasonable doubt, after finding first that total aggravation outweighed total mitigation, that imposition of death penalty is justified and appropriate in the circumstances.)

Moreover, when a jury is forced to return a death sentence even though the aggravating and mitigating circumstances are equally balanced, or the jury is unable to decide whether aggravating circumstances outweigh mitigating circumstances, the jury is precluded from giving effect to the mitigating evidence which the defendant proffers as a basis for a sentence less than death. See Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978)(plurality opinion) (holding that death penalty statute must not preclude consideration of relevant mitigating factors); Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) (reaffirming that sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as a basis for a sentence less than death); Penry v. Lynaugh, 492 U.S. 302, 328 (1989)("In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,'...the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's

background and character or the circumstances of the crime"(quoting Woodson, 428 U.S. at 305)).

A Kansas jury that determines that aggravating and mitigating circumstances are in equal balance is not allowed to give effect to the mitigating circumstances it has found. Rather than allowing the jury to resolve its doubt in favor of a life sentence by virtue of the evidence in mitigation, K.S.A. 21-4624(e) forces the jury to disregard the mitigating evidence altogether and impose the death penalty. See Jackson v. Dugger, 837 F.2d 1469, 1473-1474 (11th Cir. 1988)(Florida jury instruction that death presumed appropriate penalty unless aggravating circumstances are overridden by one or more mitigating circumstances vitiates individualized sentencing determination required by the 8th Amendment and is unconstitutional; instruction created risk that death penalty would be imposed in spite of factors which may call for a less severe penalty, and such an instruction "tilts the scales by which the jury is to balance aggravating and mitigation circumstances in favor of the state").

K.S.A. 21-4624(e) is fundamentally unfair and unconstitutional, not only because it renders unreliable any death sentence imposed under it, but also because it creates a burden-shifting presumption of death upon proof of an aggravating circumstance. The statute clearly creates a presumption of death by requiring death unless mitigating circumstances outweigh aggravating circumstances. If the state's only burden, once it proves the existence of an aggravating circumstance, is to prove that the aggravating circumstance and mitigating circumstance or circumstances, if any, are in equal balance, then the ultimate burden shifts to the defendant to avoid the death sentence by proving that the mitigating circumstances outweigh the aggravating circumstances.

In 1995, the House Judiciary Committee of the Kansas Legislature was made aware of the constitutional infirmity in K.S.A. 21-4624(e). In its Outline of Remarks by Attorney General Carla Stovall dated March 14, 1995, the Judiciary Committee noted a recommendation that the statute be amended to require that aggravating factors outweigh mitigating factors, and stated: "Now if they are equal, 'tie' goes to state. We're proposing 'tie' goes to defense..." See Appendix III-A, at 5. House Bill 2532 was introduced in the 1995 Kansas Legislative Session, which would have amended K.S.A. (1994 Supp.) 21-4624(e) to require that aggravating circumstances outweigh mitigating circumstances in order for a death sentence to be imposed. See Appendix III-B, at 8. However, the bill died in committee. See 1996 House Actions Report 51 (Kansas Legislative Information System, Final Report, May 23, 1996).

Indeed, Kansas is unique among the thirty-eight death penalty states in mandating death when the aggravating and mitigating circumstances are in equal balance. See Appendix in Brief of *Amicus Curiae*, The Cornell Death Penalty Project. And, in those states which previously had a sentencing formula like K.S.A. 21-4624(e), the formula was uniformly held to be fundamentally unfair in violation of due process, and in some cases was held to be unconstitutional in violation of both due process and the prohibition against cruel and unusual punishment under federal and/or state constitutional provisions.

In State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987), the capital sentencing jury was instructed in accordance with the New Jersey death penalty statute in effect at the time of trial, which stated that, "If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death." 524 A.2d at 151-152, 153(quoting N.J. Stat.Ann. (1985) 2C:11-3c.(3)(a)). Considering the issue sua

sponte, the New Jersey Supreme Court reversed the death sentence imposed on the defendant, finding that the trial court's instruction requiring the jury to impose death if it found that the aggravating factors are not outweighed by the mitigating factors was fundamentally unfair, because "if aggravating and mitigating factors were of equal weight, the penalty would be death." 524 A.2d at 150-151, 153. The court stated:

> It is difficult to believe that the Legislature thought it fundamentally fair that a defendant be executed except where the mitigating factors outweigh the aggravating; the concept of executing him where the explanation for his misconduct (the mitigating factors) were equally as significant as the culpable aspects of that misconduct (the aggravating factors) is foreign to what the Legislature would certainly intend. We speak here about the ultimate value judgment, the ultimate question of life or death, for while the formulation is in terms of "beyond a reasonable doubt," and therefore appropriately applicable to fact-finding, the weighing process really is not fact-finding at all but a judgmental determination by the jury, based on conflicting values, of whether the defendant should live or die. See Barclay v. Florida, 463 U.S. 939, 950, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134, 1144 (1983)(plurality opinion)("It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing."). If anywhere in the criminal law a defendant is entitled to the benefit of doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors outweigh mitigating factors, and this balance must be found beyond a reasonable doubt.

524 A.2d at 156.

The New Jersey court also noted that a recently passed statutory amendment to the relevant statute was intended by

the legislature, as shown by the legislative history, to "'clarify that aggravating factors must outweigh any mitigating factors in order for a death sentence to be imposed.'" 524 A.2d at 156-157(citation omitted). The New Jersey statute now provides in relevant part that, "If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death." N.J. Stat.Ann. §2C:11-3c.(3)(a). See Blystone v. Pennsylvania, 494 U.S. 299, 108 L.Ed.2d 255, 110 S.Ct. 1078 (1990)(upholding constitutionality of death penalty statute requiring jury to impose death sentence when aggravating factors outweigh mitigating factors); Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990)(same).

In People v. Young, 814 P.2d 834 (Colo. 1991), a statute substantially similar to K.S.A. 21-4624(e) was held to violate the prohibition of cruel and unusual punishments and the right to due process of law under the Colorado constitution. The relevant portions of the statute at issue in *Young* read:

> [(2)(b)](III) In the event that the jury finds that at least one statutory aggravating factor has been proved beyond a reasonable doubt, and that there are insufficient statutory mitigating factors or other mitigating circumstances to outweigh any statutory aggravating factor or factors that were proved and any other aggravating circumstances that were proved, the jury shall return a sentence of death.

See 814 P.2d at 841. The statutory scheme at issue in Young eliminated an additional step in the previous version of the same statute, which instructed that "'finally, if the jury finds that any mitigating factors do not outweigh the proven statutory aggravating factors, it must decide whether the defendant should be sentenced to death or to life imprisonment.'" 814 P.2d at 840(quoting People v.

Tenneson, 788 P.2d 768, 789 (Colo. 1990)(quoting Colo.Rev. Stat. (1986) §16-11-103(2)(a)(III)).

Citing United States Supreme Court precedent that a sentence of death requires a greater degree of certainty and reliability (Mills v. Maryland, 486 U.S. 367, 100 L.Ed.2d 384, 108 S.Ct. 1860 (1988); California v. Ramos, 463 U.S. 992, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983); Lockett v. Ohio, 438 U.S. 586; Woodson v. North Carolina, 428 U.S. 280), the Colorado Supreme Court found that the "[c]onsideration of the nature of the process of weighing aggravating and mitigating factors exposes the lack of reliability of a sentencing procedure that requires a sentence of death when those factors are in equipoise, in absence of any further required step." 814 P.2d at 843, 844. The court reasoned that:

> In the situation of equal balance between aggravating and mitigating factors, jurors engaged in the profoundly moral evaluation of the defendant's character and crime -- expressed by the statute as a process of weighing aggravating and mitigating factors -- will have concluded that the considerations suggesting that life imprisonment is the appropriate punishment weigh as heavily as those commending death. In other words, the jury would be unable to determine whether under statutory standards, death is the appropriate penalty.
>
> The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury *cannot* determine with reliability and certainty that the death sentence is appropriate under the standards established by the legislature...A jury determination that [aggravators and mitigators] are in equipoise means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded inconclusive results. A death sentence

> imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles.

814 P.2d at 844-845.

Finally, in Hulsey v. Sargent, 868 F.Supp. 1090 (E.D. Ark. 1993), the federal district court found that the Arkansas death penalty sentencing statute violated due process and was therefore unconstitutional, because it effectively mandated death if mitigating circumstances did not outweigh aggravating circumstances. The petitioner argued that the weighing equation created an impermissible presumption of death, and, although the burden of establishing that mitigation circumstances outweigh aggravating circumstances was not allocated under the statute, the weighing equation shifted the burden of persuasion to the defendant to prevent a death sentence. 868 F.Supp. at 1099. Analyzing the petitioner's claims, the court stated:

> Petitioner suggests two disturbing possibilities which, if true, establish due process violations. If a jury found the mitigating and aggravating circumstances in equipoise, neither one more probative than the other, or, could not fairly come to a conclusion about what balance existed between them, they would be obliged to impose the death sentence since the mitigating circumstances would not be found to outweigh the aggravating.

868 F.Supp. at 1101.

The Hulsey court found a critical distinction between the Arkansas statute and a statutory scheme containing a similar weighing equation but including a "saving" instruction permitting imposition of a life sentence even if the mitigating circumstances do not outweigh the aggravating circumstances. 868 F.Supp. at 1102 (citing Smith v. Armontrout, 888 F.2d 530 (Mo. 1989)(upholding

constitutionality of Missouri capital sentencing statute.)[92] Thus, the court held:

> Here, it is explicit in the statute that mitigating must outweigh aggravating circumstances and no saving instruction is found. Here too, the strictures of the Eighth and Fourteenth Amendments with their requirements of individualized sentencing and full consideration of evidence in mitigation appear to require relief...[T]he death presumption and burden-shifting claims may be collapsed into one inquiry: Whether the weighing equation as drawn "offends federal due process by effectively mandating death." The Court concludes that under the Arkansas statute under which petitioner was sentenced, it does.

868 F.Supp. at 1103. (Citation omitted).[93]

Subsequent to Hulsey, the Arkansas was amended to state that, in order to impose a death sentence, the jury must find

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[92]Indeed, in other cases upholding a sentencing formula requiring that mitigating circumstances outweigh aggravating circumstances, the formula included a similar "saving" instruction. See, e.g., People v. Tenneson, 788 P.2d 786 (Colo. 1990)(predecessor to statute struck down as unconstitutional in People v. Young, supra); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982)(Mississippi).

[93]In Jones v. Dugger, 928 F.2d 1020 (11th Cir. 1991), the Eleventh Circuit Court of Appeals relied upon Walton v. Arizona, 497 U.S. 639, to uphold an instruction which shifted to the defendant the burden of proving that mitigating factors outweighed aggravating factors, stating that it was bound by Walton "to reject Jones' argument regarding the proper allocation of the burden to prove mitigating factors." 928 F.2d at 1029. However, the Jones court takes the holding in Walton too far. It is one thing to allocated to the defendant the burden of proving the existence of mitigating circumstances. See Walton, 497 U.S. at 649-650. It is quite another to require that the defendant not only prove the existence of mitigating circumstances, but also to prove that the mitigating circumstances outweigh the aggravating circumstances and thus prove that he should not be sentenced to death. Walton does not address the latter.

that "aggravating circumstances outweigh beyond a reasonable doubt mitigating circumstances found to exist." See A.C.A. §5-4-603(a). Like New Jersey's capital sentencing statute, the amended Arkansas statute is now in accord with the statutes found to be constitutional in Blystone, 494 U.S. 299, and Boyde, 494 U.S. 370.

K.S.A. 21-4624(e) is quite distinct from mandatory death penalty statutes which have been upheld by the United States Supreme Court. See Walton v. Arizona, 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990)(plurality opinion); Boyde, 494 U.S. 370; Blystone, 494 U.S. 299. Unlike K.S.A. 21-4624(e), the statutes at issue in Walton, Boyde and Blystone do not require the sentencer to impose death when aggravating and mitigating circumstances are equally balanced.

The statutes in both Boyde and Blystone require the jury to impose death only when the aggravating circumstances outweigh the mitigating circumstances. Boyde, 494 U.S. at 374 (jury instructed in accordance with California death penalty statute that it "shall impose" a sentence of death if it concluded that the aggravating circumstances outweigh the mitigating circumstances); Blystone, 494 U.S. at 302 (Pennsylvania statute mandating death if jury finds aggravating circumstances outweigh mitigating circumstances.)

At issue in Walton was the Arizona capital sentencing statute which mandates a sentence of death "if the court finds one or more of the aggravating circumstances enumerated...and that there are no mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 644 (quoting Ariz.Rev.Stat.Ann. §13-703(E)). Holding that Boyde and Blystone precluded Walton's claim, the Court reiterated the holdings of both cases, specifically noting that in Blystone, because the statute at issue there did not preclude the sentencer from considering any type of

mitigating evidence, it was consistent with the 8th Amendment's requirement of individualized sentencing. 497 U.S. at 651-652.

The Arizona statute in Walton does not mandate a death sentence if the sentencing court finds that aggravating and mitigating circumstances are in equal balance. It only mandates a death sentence if the court finds "no mitigating circumstances sufficiently substantial to call for leniency." This language frees the sentencer to decide either way between a death sentence and life imprisonment, regardless of the relative weight given to the aggravating and mitigating circumstances. Thus, under the Arizona statute, the sentencer is free to find that mitigating circumstances are "sufficiently substantial to call for leniency", not only when it finds that the aggravating and mitigating circumstances are in equal balance, but even if it finds that aggravating circumstances outweigh mitigating circumstances. See State v. Valencia, 645 P.2d 239 (Ariz. 1982)(Reversing death sentence, Supreme Court of Arizona stated: "By using the term 'sufficiently substantial,' we believe the legislature intended that the trial court might give unequal weight to the various aggravating and mitigating circumstances when indicated by the facts in each case...We do not believe the legislature intended the court to play a numbers game and automatically apply the death penalty when the number of aggravating circumstances found exceeded the number of mitigating circumstances found, any more than it intended to require life imprisonment when the number of mitigating circumstances found exceeded the number of aggravating circumstances found"); State v. Trostle, 951 P.2d 869, 888 (Ariz. 1997)("There is no scale upon which to measure what is or is not 'sufficiently substantial'...Where 'there is a doubt whether the death sentence should be imposed, we will resolve that doubt in favor of a life sentence'")(quoting Valencia, 645 P.2d at 241)).

The "sufficiently substantial" language in the Arizona statute is thus tantamount to a "saving" instruction requiring the sentencer to make a determination, after weighing aggravating and mitigating circumstances, whether or not death is the appropriate punishment. K.S.A. 21-4624(e) leaves no option to the jury upon finding either that the aggravating and mitigating circumstances are in equal balance or that the aggravating circumstances outweigh the mitigating circumstances – the jury must impose death.[94]

In forcing a jury to impose death when aggravating and mitigating circumstances are in equal balance, or when the jury is unable to decide the balance one way or the other, K.S.A. 21-4624(e) renders death sentences in Kansas unreliable, and creates a presumption of death which shifts the burden to the defendant to prove that he should not be sentenced to death. Consequently, K.S.A. 21-4624(e) is unconstitutional under the 8th and 14th Amendments, and §9 and §18 of the Kansas Bill of Rights. Mr. Kleypas' death sentence must be vacated.

* * *

[94]The district court could have cured the defect in Mr. Kleypas' case by giving any of the defendant's proposed jury instructions requiring the jury to separately determine, after weighing the aggravating and mitigating circumstances, whether death was an appropriate punishment (R. 10, 2246, 2263, 2286, 2287, 2289, 2290, 2291, 2293, 2297, 2298, 2300). It failed to do so. Moreover, the fact remains that K.S.A. 21-4624(e), which contains no savings clause, is unconstitutional for the reasons stated herein.

[Received February 14, 2000]

NO. 98-80920-S

IN THE
SUPREME COURT OF THE STATE
OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

GARY W. KLEYPAS
Defendant-Appellant

BRIEF OF APPELLEE
VOLUME II

APPEAL FROM THE DISTRICT COURT OF
CRAWFORD COUNTY, KANSAS
HONORABLE DONALD NOLAND, JUDGE
DISTRICT COURT CASE NO. 96-CR-240-G

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* * *

Issue XLIV. The Supreme Court of the United States has expressly approved the constitutionality of mandating a death sentence-once the State has proven aggravating circumstances-unless the defendant persuades the sentencer that mitigating circumstances outweigh those circumstances.

Standard of Review

The interpretation of a statute is a question of law wherein review is unlimited. *State v. Donlay*, 253 Kan. 132, 133-34, 853 P.2d 680 (1993).

Argument and Authorities

In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court expressly rejected the very argument that defendant makes here: that it is unconstitutional to mandate a death sentence unless the defendant persuades the sentencer that mitigating circumstances outweigh the aggravating circumstances that the State has proven. The defendant in *Walton* made the very same argument, stating Question Presented 2(a) in his brief as whether the Arizona statute violated the Constitution by "requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency."" Brief of Petitioner, *Walton v. Arizona*, No. 88-7351, at i.[13] The defendant further explained the Arizona statutory language as follows: "This statutory language tells an Arizona sentencing judge who

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[13] Merits briefs in Supreme Court cases are available through both Lexis and Westlaw. Lexis, for example, does not assign electronic database citations to briefs, but such documents can be located through a search in the Lexis "Genfed" library, "Briefs" file, using the Supreme Court case number, such as "Number (88-7351)" for *Walton v. Arizona*. For the Court's convenience this brief is included in the Appendix Vol. II, pp. 21-118.

finds even a single aggravating factor, that death must be imposed unless-as the Arizona Supreme Court put it in Petitioner's case-there are 'outweighing mitigating factors.'" *Id.* at 33.

The Court expressly addressed and rejected the defendant's argument. Justice White, writing for four Justices, declared that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 650, 110 S.Ct. at 3055. Justice White went on to reject any notion that the Arizona statute, which is functionally indistinguishable from the Kansas statute in this respect, created an unconstitutional presumption in favor of death sentences. *Walton*, 497 U.S. at 651-52, 110 S. Ct. at 3056. Justice White was writing for four Justices rather than the Court only because Justice Scalia, who concurred in the judgment on these issues, would have endorsed *mandatory* death sentences in all circumstances. See *Walton*, 497 U.S. at 661-67, 110 S.Ct. at 3061-64 (Scalia, J., concurring in part and concurring in the judgment); *Campbell v. Wood*, 18 F.3d 662, 675 n.5 (9th Cir. 1994) (discussing the Justices' votes in *Walton*).

Thus, a majority of the Court expressly rejected the very claim defendant (and his amicus, the Cornell Death Penalty Project) is now raising. *See also Walton*, 497 U.S. 497 U.S. at 686-90, 110 S. Ct. at 3075-76 (Blackmun, J., dissenting) (recognizing that the Court had rejected the argument that the Arizona statute established an unconstitutional presumption of death). State courts and lower federal courts also have rejected such claims. *See, e.g., People v. Mitchell*, 152 Ill.2d 274, 346, 604 N.E.2d 877, 912 (1992) (relying on *Walton* in rejecting argument that Illinois statute creates an

unconstitutional presumption in favor of a death sentence; citing other cases to same effect).

* * *

[Received May 1, 2000]

No. 98-80920-S

IN THE
SUPREME COURT OF THE STATE
OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

GARY W. KLEYPAS
Defendant-Appellant

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Crawfprd County,
Kansas
Honorable Donald Noland, Judge
District Court Case No. 96 CR 240G

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Issue XLIV: K.S.A. 21-4624(e) is unconstitutional in violation of the 8th and 14th Amendments to the United States Constitution and § 9 and § 18 of the Kansas Bill of Rights, because it mandates a death sentence even if the jury is unable to decide whether aggravating circumstances outweigh mitigating circumstances; the statute created a presumption of death and shifts the burden of proof to the defendant to prevent a death sentence.

In response to this argument, the state relies entirely on Walton v. Arizona, 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990) to suggest that in that case "the United States Supreme Court rejected the very argument that defendant makes here: that it is unconstitutional to mandate a death sentence unless the defendant persuades the sentencer that mitigating circumstances outweigh the aggravating circumstances that the State has proven" (Brief of Appellee, at 239). The state not only refuses to acknowledge the distinct statutory language of the Arizona statute at issue in Walton, bit it simply misreads what was actually decided by the Court in that case.

The relevant issue in Walton concerned only the question which the Court expressly reserved opinion on in Lockett v. Ohio, 438 U.S. 586, 609, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), i.e., "'whether it violates the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases.'" Walton, 497 U.S., at 650. The Court in Walton answered that question in the negative, holding that the burden of proving the existence of mitigating circumstances could be placed on the defendant without violating the Constitution. Id. The holding in Walton goes no further, yet the state in this case seeks to extend that holding far beyond its

parameters. It is one thing to place the burden of proving the existence of mitigating circumstances on the defendant, which Walton permits; it is quite another to place the burden on the defendant to disprove that he should be sentenced to death, which K.S.A. 21-4624(e) does by requiring a death sentence unless the aggravating circumstances are "not outweighed by any mitigating circumstances which are found to exist."

Unlike the Arizona statute at issue in Walton, which states that a court shall impose a death sentence if the court finds one or more aggravating circumstances and "that there are no mitigating circumstances sufficiently substantial to call for leniency," and which the Court found did not create an unconstitutional presumption of death (497 U.S., at 644, 651-652), the Kansas statute, K.S.A. 21-4624(e), clearly creates a presumption of death because it requires a death sentence even if the aggravating and mitigating circumstances are in equal balance, i.e., a death sentence must be imposed despite reasonable doubt that it is an appropriate sentence. See State v. Biegenwald, 524 A.2d 130, 154 (N.J. 1987) ("a determination of death despite reasonable doubt as to its justness would be unthinkable").

As is discussed in the Brief of Appellant, the distinct language of the Arizona statute at issue in Walton does not create a presumption of death because it only requires a death sentence if the court finds "no mitigating circumstances sufficiently substantial to call for leniency," language which frees the sentencer to decide between a death sentence and life imprisonment regardless of the relative weight given to the aggravating and mitigating circumstances. Thus, the sentencer can find that mitigating circumstances are "sufficiently substantial to call for leniency" and impose life imprisonment even if the mitigating circumstances do not outweigh the aggravating circumstances, or indeed, even if the aggravating

circumstances outweigh the mitigating circumstances.[10] See Brief of Appellant, at 512-514. Indeed, statutes in Washington and Illinois employing language substantially similar to that in the Arizona statute have been interpreted as creating a "presumption of leniency" (see Campbell v. Kincheloe, 829 F.2d 1453, 1465-1466 (9th Cir. 1987), holding that Washington death penalty statute, requiring jury to determine whether there are "sufficient circumstances to merit leniency," creates a presumption of leniency which continues throughout the entire proceeding unless it has been overcome by proof beyond a reasonable doubt by the state; Campbell v. Wood, 18 F.3d 662. 674-675 (9th Cir. 1994) (same)), or as allowing imposition of a death sentence only after the sentencer determines that the aggravating circumstances outweigh the mitigating circumstances (see Silagy v. Peters, 905 F.2d 986, 1000 (7th Cir. 1990)

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[10] In State v. Spain, 2000 WL 426381 (Kan. 2000), this Court held that the imposition of a hard 40 sentence where the district court finds the aggravating circumstances are not outweighed by mitigating circumstances does not constitute cruel or unusual punishment under § 9 of the Kansas Constitution Bill of Rights or the 8th Amendment to the United States Constitution. As this Court has clearly separated the law governing hard 40 cases and the law governing death penalty cases (Spain, 2000 WL 426381, *5), the holding in Spain has no application to this case. This Court's decision in Spain is notable in one respect: Discussing Walton, this Court noted that the majority in Walton found that the Arizona statute does not create an unconstitutional presumption of death. The appellant agrees that the Arizona statute does not create a presumption of death, because as explained herein and in the Brief of Appellant, under the Arizona statute a court can impose life imprisonment regardless of the relative weight of the aggravating and mitigating circumstances. Walton thus stands for the proposition that any capital sentencing statute that creates a presumption of death is unconstitutional. The Arizona statute survived scrutiny because it did not create such a presumption. In contrast, the Kansas statute does create a presumption of death by requiring a death sentence even if the aggravating and mitigating circumstances are in equal balance, which is unconstitutional.

(interpreting Illinois statute requiring death if mitigation is not "sufficient to preclude" the death penalty)).[11]

In contrast, every court that has considered the type of weighing equation set forth in K.S.A. 21-4624(e), mandating a death sentence if the aggravating circumstances are not outweighed by the mitigating circumstances, has struck down the statute as unconstitutional in violation of due process and/or prohibitions against cruel and unusual punishment. See Brief of Appellant, at 507-511 (discussing State v. Biegenwald, 524 A.2d 130; People v. Young, 814 P.2d 834 (Colo. 1991); Hulsey v. Sargent, 868 F.Supp. 1090 (E.D. Ark. 1993)).[12] The state does not discuss, indeed, does not even acknowledge these cases in its brief, even though those cases are on all fours with this case in terms of the unconstitutionality of K.S.A. 21-4624(e).

For the reasons stated herein and in the Brief of Appellant, K.S.A. 21-4624(e) is unconstitutional under the 8th and 14th

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[11] Silagy v. Peters is cited in People v. Mitchell, 604 N.E.2d 877, 912 (Ill. 1992), a case relied on by the state in its argument. See Brief of Appellee, at 241. Given that Silagy makes clear that statutes similar to those at issue in Walton are substantially different than K.S.A. 21-4624(e), the state's reliance on these cases as support for its position is grossly misplaced.

[12] Discussing the constitutionally requisite eligibility and selection stages of the decision-making process at the penalty phase (see Tuilaepa v. California, 512 U.S. 967, 971, 129 L.Ed.2d 750, 114 S.Ct. 2630 (1994)), the Colorado Supreme Court in People v. Dunlap, 975 P.2d 723 (Colo. 1999) concluded that in a weighing state, the eligibility stage extends through the weighing process, and the selection stage occurs in the context of the "saving" clause, when the jury makes its final decision, after weighing aggravating and mitigating circumstances, about whether the defendant should be sentenced to life imprisonment or death. 975 P.2d, at 739. If the selection stage occurs at the point where the jury deliberates pursuant to the "saving" clause, the absence of such clause from K.S.A. 21-4624(e) means that our statute omits the selection stage from the deliberative process at the penalty phase, a further structural defect in the statute which renders it unconstitutional under the 8th and 14th Amendments.

Amendments, and § 9 and § 18 of the Kansas Bill of Rights, and Mr. Kleypas' death sentence must be vacated.

* * *

[Received December 22, 1999]

No. 98-80920-S

In the
SUPREME COURT
OF THE STATE OF KANSAS

State of Kansas, *Plaintiff-Appellee*

vs.

Gary W. Kleypas, *Defendant-Appellant*

Brief of the Cornell Death Penalty Project as Amicus Curiae in Support of Appellant

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Appeal from The District Court of
Crawford County, Honorable Donald R.
Noland, Judge, District Court Case No. 96CR240G

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In the
SUPREME COURT
OF THE STATE OF KANSAS

Gary W. Kleypas, *Appellant*

v.

State of Kansas, *Appellee*.

Appeal from The District Court of
Crawford County, Honorable Donald R.
Noland, Judge, District Court Case No. 96CR240G

INTEREST OF *AMICUS CURIAE*

The Cornell Death Penalty Project is an undertaking of the Cornell Law School. One of the Project's primary goals is to address questions of law that carry important implications beyond the facts of any particular case and that involve the basic fairness of the death penalty's administration. Moreover, the Project's approach to these questions is informed to the greatest extent possible by reliance on empirical studies of the capital sentencing process. In addition, the Project itself engages in advanced empirical analysis of juror decision making in capital cases. The Project accordingly seeks to intervene as *amicus curiae* in selected cases presenting such important questions of law.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

[N]or [shall] cruel and unusual punishments be inflicted;

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law;

This case also involves Kansas Statutes Annotated § 21-4624(e), which provides in relevant part:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. § 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death . . ..

STATEMENT

Appellant Gary W. Kleypas was convicted of capital murder and sentenced to death in the District Court of Crawford County. The sentencing jury was instructed that it must impose death if it found that aggravating circumstances were not outweighed by mitigating circumstances.

SUMMARY OF ARGUMENT

Because the Kansas death-penalty statute requires a capital sentencing jury to impose death when the jury does not decide that the nature of the crime and the characteristics of the offender warrant the imposition of the death penalty, it is both fundamentally unfair and unconstitutional, in violation of the English and Fourteenth Amendments to the United States Constitution.

ARGUMENT

Section 21-4624(e) of the Kansas capital sentencing statute violates the Eighth and Fourteenth Amendments to the United States Constitution because it requires the jury to impose death when its members

do not decide that death is the appropriate punishment.

A.

According to § 21-4624(e) of the Kansas capital sentencing statute, the jury must impose a death sentence if it finds beyond a reasonable doubt that at least one aggravating circumstance exists, and "that the existence of such aggravating circumstances [i.e., all aggravating circumstances proven beyond a reasonable doubt] is *not outweighed by* any mitigating circumstances which are found to exist; otherwise, the defendant shall be sentenced as provided by law." (emphasis added)

Section 21-4624(e) thus requires the jury to return a death sentence when statutory aggravating circumstances outweigh mitigating circumstances, *or* when aggravating circumstances and mitigating circumstances are in equipoise. In other words, § 21-4624(e) requires the jury to return a death sentence not only when it decides that aggravating circumstances outweigh mitigating circumstances, but also when it does not decide one way or another whether aggravating circumstances outweigh mitigating circumstances. Section 21-4624(e) therefore allocates to the defendant the risk of nonpersuasion with respect to whether or not he should be sentenced to death. *Cf. State v. Biegenwald*, 106 N.J. 13, 60-61, 524 A.2d 130, 155 (1987) (giving this construction to the same language in former version of New Jersey's capital sentencing scheme).

The unfairness and unconstitutionality of § 21-4624(e)'s sentencing formula is self-evident once it becomes clear exactly what that formula requires. It cannot be consistent with fundamental fairness to require a capital defendant to bear the risk of a death sentence when the jury does not decide that such a sentence is warranted.

Some capital sentencing schemes require the jury to impose death when the jury decides that the nature of the

crime and the character of the offender is more "aggravated" than "mitigated." In essence, such statutes send the message that the law has no place for mercy. They demand that the death penalty be imposed if the jury finds that the defendant deserves it, which is another way of saying if the jury finds that aggravating circumstances outweigh mitigating circumstances.

Such schemes may be constitutionally and morally unobjectionable. Mercy, one may reasonably think, is the province of the governor, constitutionally and morally. Yet Kansas' capital sentencing scheme goes further. It requires a capital jury to return a death sentence not only when it decides that the defendant deserves death (and so precludes it from being merciful), but also when it does not decide that death is the deserved punishment.

The law's moral judgment should be especially reliable, clear, and unequivocal when it exercises its most profound condemnation. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976) (plurality opinion) ("Because [death is qualitatively different from a sentence of life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *see also Lankford v. Idaho*, 500 U.S. 110, 125, 111 S.Ct. 1723, 1732, 114 L.Ed.2d 173, 187 (1991) (noting "emphasi[s on] the special importance of fair procedure in the capital sentencing context"); *cf.* In re *Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73, 25 L.Ed.2d 368, 375 (1970) ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

But § 21-4624(e) makes judgments of death in Kansas unreliable, unclear, and replete with equivocation. No one can say for sure that a defendant sentenced to death in

accordance with § 21-4624(e) deserved the punishment he received. Moreover, this result simply cannot be reconciled with the Eighth Amendment's demand for heightened reliability in capital sentencing. A death sentence imposed pursuant to § 21-4624(e) cannot with any confidence be said to reflect the jury's "reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 2947, 106 L.Ed.2d 256, 279 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 841, 93 L.Ed.2d 934, 942 (1987) (O'Connor, J., concurring) (emphasis in original)). Instead, it will often represent nothing more than the operation of a presumption in favor of death.

In addition, § 21-4624(e) turns the law's ordinary and sensible priorities upside down. As a matter of due process, the procedural protections the law provides a citizen faced with a state-imposed deprivation usually depends on the strength of the individual interest at stake. The stronger the interest, the greater the protections. *See, e.g., Winship*, 397 U.S. at 363-64, 90 S. Ct. at 1072, 25 L.Ed.2d at 375; *see also Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979) ("The standard [of proof] serves to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision."). *See generally* Linda E. Carter, *A Beyond A Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L.J. 195, 217-21 (1991); Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 370-71 (1984).

For example, when the state wishes to terminate a parent's rights over his or her children on grounds of "unfitness," the risk of nonpersuasion rests with the state. *See e.g.*, In re *S.M.Q.*, 247 Kan. 231, 233, 796 P.2d 543, 545 (1990); *cf. Santosky v. Kramer*, 455 U.S. 745, 769-70, 102 S. Ct. 1388, 1403, 71 L.Ed.2d 599, 617 (1982) (holding that Due Process

minimally requires states to prove by clear and convincing evidence factual allegations necessary to terminate parental rights). But § 21-4624(e) says that when the state wishes to take a defendant's *life*, not just his kids, the risk of nonpersuasion rests with the *defendant*, not with the state. Section 21-4624(e) thus gives a unique twist to the longstanding idea that "death is different." Far from getting additional safeguards, death gets fewer. This twist is macabre -- it also violates Due Process.

Moreover, the real-world effect of § 21-4624(e)'s presumption in favor of death is actually stronger than it first appears. Empirical studies of capital sentencing juries in other states show that jurors typically enter the penalty phase proceedings already thinking that death is the appropriate sentence, even where the applicable state law creates no such presumption. *See, e.g.*, Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L.REV. 1, 12 (1993) ("The data suggest that the sentencing phase of a capital trial [in South Carolina] commences with a substantial bias in favor of death."); James Luginbuhl & Jule Howe, *Discretion in Capital Sentencing: Guided or Misguided?*, 70 IND. L.J. 1161, 1177 (1995) ("[E]ven before hearing the instructions [North Carolina jurors are] . . . predisposed toward a verdict of death.");[5] Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L.REV. 1, 31-33 (reporting that Illinois jurors incorrectly believe that Illinois law creates a presumption in favor of death).

Amicus can think of no persuasive reason to believe that the capital sentencing process works any differently in

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[5] Both of these studies are part of the on-going analysis of the Capital Jury Project, a multistate research effort funded in part by the National Science Foundation. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) (providing overview of Project and reporting initial findings).

Kansas than it does in states where that process has actually been empirically studied. If so, then § 21-4624(e) adds insult to injury: It adds a *de jure* presumption of death *on top of* an already existing *de facto* presumption of death, stacking the deck even higher in favor of death.

Finally, § 21-4624(e)'s patent unfairness makes it unique among capital sentencing schemes, adding yet another constitutional strike against it. The Eighth Amendment's ban against cruel and unusual punishments "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L.Ed.2d 630, 642(1958) (plurality opinion). In order to determine the content of those contemporary standards, the courts look primarily to the enactments of state legislatures. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 370, 109 S. Ct. 2969, 2975, 106 L.Ed.2d 306, 318 (1989). *Amicus* have examined the sentencing formulas contained in the capital sentencing statutes of each of the thirty-seven states in addition to Kansas that currently authorize capital punishment. That examination reveals that Kansas alone unequivocally requires the jury to impose a death sentence when aggravating and mitigating circumstances are in equipoise. *See* Statutory Appendix, *infra* at. pp. 16-19.

B.

Indeed, several courts have recognized that forcing a capital sentencing jury to impose death when aggravating and mitigating circumstances are equally balanced, as does § 21-4624(e), is fundamentally unfair.

In *People v. Young*, 814 P.2d 834 (Colo. 1991) (en banc), the Colorado Supreme Court held that the recently amended Colorado death-penalty law, which required the jury to impose death if aggravating and mitigating factors were in equipoise, violated the Colorado Constitution's prohibition against cruel and unusual punishments, as well as the

requirements of due process. *See id.* at 845. "A jury determination that such factors are in equipoise," said the Court, "means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded inconclusive results." *Id.* A death sentence imposed under such circumstances carried no constitutionally adequate guarantee that death was in fact the appropriate sentence. *See id.*[6]

Likewise, in *State v. Biegenwald*, 106 N.J. 13, 57, 524 A.2d 130, 152 (1987), the "clear conclusion from [the trial court's] statement that aggravating factors must be outweighed in order for a sentence of life imprisonment to be imposed was that if aggravating and mitigating factors were of equal weight, the penalty would be death." This instruction, the New Jersey Supreme Court held, was fundamentally unfair. *See id.* at 62, 524 A.2d at 156. "If anywhere in the criminal law a defendant is entitled to the benefit of the doubt," wrote the Court, "it is here." *Id.* But the New Jersey statute and the instruction based upon it denied the defendant that benefit. Consequently, the Court held that fundamental fairness required the jury to find "that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt." *Id.*

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[6] A prior Colorado death-penalty statute, which the Colorado Supreme Court had upheld, required the jury to sentence the defendant to death if the jury determined that mitigating circumstances did not outweigh aggravating circumstances *but only if* the jury further determined that death was in fact the "appropriate punishment beyond a reasonable doubt." *See Young*, 814 P.2d at 840 (quoting *People v. Tenneson*, 788 P.2d 786, 796 (Colo. 1990)). *See also Smith v. Armontrout*, 888 F.2d 530, 544-45 (8th Cir. 1989) (upholding a presumption of death-type instruction in a Missouri jury charge where the charge included a similar "saving" instruction); *Gray v. Lucas*, 677 F.2d 1086, 1106 (5th Cir. 1982) (upholding presumption of death-type language in a Mississippi statute where the jury remained free to impose life imprisonment even if it found that aggravating and mitigating circumstances were evenly balanced).

Federal law also prohibits forcing a jury to impose death when aggravating and mitigating circumstances are evenly balanced. In *Jackson v. Dugger*, 837 F.2d 1469, 1473-74 (11th Cir. 1988), for example, the Eleventh Circuit held unconstitutional an instruction given to a Florida capital-sentencing jury that required the jury to presume that death was the appropriate sentence.[7] Likewise, in *Hulsey v. Sargent*, 868 F. Supp. 1090, 1103 (E.D. Ark. 1993), the District Court for the Eastern District of Arkansas held unconstitutional the then-applicable Arkansas statute because it, like § 21-4624(e), required the jury to impose death if mitigating circumstances did not outweigh aggravating ones.[8]

C.

The United States Supreme Court has considered and upheld sentencing formulas superficially similar to, but in fact very different from, § 21-4624(e). *See Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); *Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990); *Blystone v. Pennsylvania*, 494 U.S.

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[7] The instruction read: "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided." *Jackson*, 837 F.2d at 1473. *But cf. Jones v. Dugger*, 928 F.2d 1020, 1029 (11th Cir. 1991) (upholding under *Walton v. Arizona*, 497 U.S. 639 (1990), an instruction that "shifted to the defendant the burden to prove that mitigating factors outweighed aggravating factors"). Insofar as *Jones* reads *Walton* as endorsing the practice of forcing the jury to impose death when aggravating and mitigating circumstances are evenly balanced, amicus respectfully submits that the *Jones* panel misread *Walton*. *See infra* at pp. 12-14 (discussing *Walton*).

[8] Arkansas subsequently amended its capital sentencing to eliminate the presumption of death. *See* Ark. Code Ann. § 5-4-603(b) (Michie 1987 & Supp. 1997) (requiring the jury to impose life imprisonment if "[a]ggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist").

299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). The difference is that none of the statutory provisions involved in those cases forced the jury to impose death when aggravating and mitigating circumstances were evenly balanced, as does § 21-4624(e).

In *Blystone* and *Boyde* the statutory provisions in question only required the jury to impose death when aggravating circumstances outweighed mitigating circumstances.[9] Neither provision required the jury to impose a death sentence if it could not make up its mind as to the relative balance of aggravation and mitigation. In other words, neither required death if aggravating and mitigating circumstances were in equipoise, as does § 21-4624(e).

In *Walton*, the Supreme Court examined Arizona's capital sentencing statute, which required the sentencer to "impose a sentence of death if [it] finds one or more of the [enumerated] aggravating circumstance . . . *and* there are no mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 644, 110 S. Ct. at 3052, 111 L.Ed.2d at 522 (quoting Ariz. Rev. Stat. Ann. § 13-703(E)) (emphasis added).

The Ninth Circuit had earlier held that this language created an unconstitutional "presumption of death." *See Adamson v. Ricketts*, 865 F.2d 1011, 1042 (9th Cir. 1988) (en banc). The Supreme Court disagreed, upholding the

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[9] The Pennsylvania statute considered in *Blystone* required the jury to impose death "if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." *Blystone*, 494 U.S. at 302 (quoting 42 Pa. Cons. Stat. § 9711 (C)(1)(iv)).

The California instruction considered in *Boyde* required the jury to impose death "[i]f [it] conclude[d] that the aggravating circumstances outweigh[ed] the mitigating circumstances." *Boyde*, 494 U.S. at 374 (citing 1 California Jury Instructions 8.84.2, Criminal (4th ed. 1979)).

provision under *Blystone* and *Boyde*. *See Walton*, 497 U.S. at 651-52, 110 S. Ct. at 3056, 111 L.Ed.2d at 527.

Walton, however, is ambiguous. It might mean that a "presumption of death" is not unconstitutional. Or it might simply mean that the Arizona statute did not in fact create such a presumption in the first place. The latter reading of *Walton* is the better one, because the better reading of the Arizona statute itself is that it, unlike § 21-4624(e), does not force the sentencer to return a death sentence when aggravating and mitigating circumstances are evenly balanced.[10]

On its face, the Arizona provision operates on a different logic than does §21-4624(e). Unlike §21-4624(e), the Arizona statute does *not* tell the sentencer to impose death if aggravating circumstances are not outweighed by mitigating circumstances. Instead, it requires death only if "there are no mitigating circumstances sufficiently substantial to call for leniency." The key to the Arizona sentencing formula is the idea of "sufficiently substantial."

That language, unlike §21-4624(e), does not direct the sentencer to impose death if it finds aggravating and

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[10] Statutes in Washington and Illinois, which are similar to the Arizona statute, have been read as not creating a "presumption of death." *See, e.g., Campbell v. Kincheloe*, 829 F.2d 1453, 1466 (9th Cir. 1987) (construing Washington statute as creating a "presumption of leniency"); *Silagy v. Peters*, 905 F.2d 986, 1000 (7th Cir. 1990) ("[A] sentence of death is imposed in Illinois only after the sentencing authority determines that the aggravating circumstances outweigh the mitigating circumstances in the particular crime."); *People v. Bean*, 137 Ill.2d 65, 140, 560 N.E.2d 258, 292 (1990) ("[W]e hold that the [Illinois] death penalty statute does not unconstitutionally create a presumption that death is the appropriate penalty."). Moreover, it bears emphasizing that the Ninth Circuit in *Adamson* and the dissent in *Walton*, which both expressly read the Arizona statute as creating a "presumption of death," concluded that such a presumption was unconstitutional. *See Walton*, 497 U.S. at 686, 110 S. Ct. at 3075, 111 L.Ed.2d at 550 (Blackmun, J., dissenting); *Adamson*, 865 F.2d at 1044.

mitigating circumstances are in equipoise. If a sentencer in Arizona thought aggravating and mitigating circumstances were equally balanced, he or she could reasonably conclude that there were mitigating circumstances "sufficiently substantial to call for leniency," *or* he or she could reach the opposite conclusion. The law leaves the sentencer free to decide either way. In contrast, a Kansas juror who reached the same conclusion about the relative balance between aggravation and mitigation would have only one option: to impose death. In fact, under the Arizona scheme a sentencer who thought that aggravating circumstances actually *outweighed* mitigating circumstances could *still* conclude that the available mitigating circumstances were "sufficiently substantial"-- i.e., that they crossed some critical threshold of substantiality -- to "call for leniency." A Kansas juror clearly does not have that option.

A state has leeway to decide how to structure its capital sentencing scheme. It's under no obligation, for example, to specify or allocate burdens of proof or risks of nonpersuasion at the penalty phase. As long as the defendant has had a full opportunity to present evidence in mitigation, a state can, if it so chooses, leave the jury to decide for itself what to do if aggravation and mitigation are in equipoise. On the other hand, if a state *does* choose to allocate burdens in the penalty phase, it cannot do so in a way that forces the jury to impose death when it has not decided that the defendant deserves death.

CONCLUSION

For the reasons advanced above, *amicus* respectfully request the Court to declare Kansas Statutes Annotated § 21-4624(e) unconstitutional.

Respectfully submitted,

/s/ Stephen P. Garvey

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STATUTORY APPENDIX
(current through 1997 supplements)

State	*Statutory Provision*	*Relevant Statutory Language*
Alabama	Ala. Code § 13A-5-46(e)(2)	"If the jury determines that one or more aggravating circumstances ... exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole."
Arizona	Ariz. Rev. Stat. § 13-703(E)	Court "shall impose a death sentence if the court finds one or more aggravating circumstances ... and that there are no mitigating circumstances sufficiently substantial to call for leniency."
Arkansas	Ark. Code Ann. § 5-4-603(b)	Jury shall impose life imprisonment if "[a]ggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist."
California	Cal. Penal Code § 190.3	Trier of fact "shall impose a sentence of death if [it] ... concludes that the aggravating circumstances outweigh the mitigating circumstances," and shall impose "a sentence of confinement in state prison for a term of life without the possibility of parole" if it "determines that the mitigating circumstances outweigh the aggravating circumstances."

Colorado	Colo. Rev. Stat. § 16-11-103(2)(b)	Sentencing authority "shall not impose a death sentence unless it unanimously finds ... [t]here are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved."
Connecticut	Conn. Gen. Stat. § 53a-46a(g)	Court "shall impose a sentence of life imprisonment without the possibility of parole" if the trier of fact finds that the aggravating factors "do not outweigh the one or more mitigating factors."
Delaware	Del. Code Ann. tit. 11, § 4209(d)	"A sentence of death shall be imposed . . . if the Court finds ... that the aggravating circumstances ... outweigh the mitigating circumstances. Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life ...."
Florida	Fla. Stat. Ann. § 921.141(3)	"[I]f the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the fact[]:... [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."
Georgia	Ga. Code Ann. § 17-10-31	Georgia is a "threshold" state. It specifies no sentencing formula beyond the constitutional requirement of a finding of at least one statutory aggravating circumstance.

Idaho	Idaho Code § 19-2515(c)	"[T]he court shall sentence the defendant to death unless the court finds that mitigating circumstances ... are sufficiently compelling that the death penalty would be unjust."
Illinois	720 111. Comp. Stat. 5/9-1(g)	"If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death penalty, the court shall sentence the defendant to death."
Indiana	Ind. Code § 35-50-2-9(k)	"Before a [death] sentence may be imposed ... [the trier of fact] must find that:... any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances."
Kentucky	Ky. Rev. Stat. Ann. § 532.025(3)	Kentucky is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance.
Louisiana	La. Rev. Stat. Ann. § 905.3	Louisiana is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance.

Maryland	Md. Ann. Code art. 27, § 413(h)	"If [the court or jury] finds that the aggravating circumstances outweigh the mitigating circumstances, the sentence shall be death.... If [the court or jury] finds that the aggravating circumstances do not outweigh the mitigating circumstances, a sentence of death may not be imposed."
Mississippi	Miss. Code Ann. § 99-19-101(3)	"For the jury to impose a sentence of death, it must unanimously find in writing the following:... [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances."
Missouri	Mo. Rev. Stat. § 565.030(4)	"The trier shall assess and declare the punishment at life imprisonment ...: [i]f the trier does not find that the evidence in aggravation of punishment ... warrants imposing the death penalty; or [i]f the trier concludes that there is evidence in mitigation of punishment ... sufficient to outweigh the evidence in aggravation of punishment ...; or [i]f the trier decides under all the circumstances not to assess and declare the punishment at death."
Montana	Mont. Code Ann. § 46-18-305	"[T]he court ... shall impose a sentence of death if it ... finds that there are no mitigating circumstances sufficiently substantial to call for leniency."

Nebraska	Neb. Rev. Stat. § 29-2522	"[T]he judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations: (1) Whether sufficient aggravating circumstances exists to justify the imposition of a sentence of death; (2) Whether sufficient mitigating circumstances exists which approach or exceed the weight given to the aggravating circumstances; or (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases...."
Nevada	Nev. Rev. Stat. § 200.030(4)(a)	"A person convicted of murder in the first degree ... shall be punished: (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found to exist do not outweigh the mitigating circumstances; or (b) By imprisonment in the state prison[] ...."
New Hampshire	N.H. Rev. Stat. § 630:5(IV)	"[I]f the jury concludes that the aggravating factors outweigh the mitigating factors or that the aggravating factors, in the absence of any mitigating factors, are themselves sufficient to justify a death sentence, the jury ... may recommend that a sentence of death be imposed .... The jury ... is never required to impose a death sentence and the jury shall be so instructed."

New Mexico	N.M Stat. Ann. 31-20A-2(B)	New Mexico is a threshold state. It specifies no sentencing formula.
New York	N.Y. Crim. Proc. Law § 400.27(1 1)(a)	"The jury may not direct the imposition of a sentence of death unless it unanimously fnds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factors or factors established, if any, and unanimously determines that the penalty of death should be imposed."
North Carolina	N.C. Gen. Stat. § 15A-2000(b)	"[T]he jury shall deliberate and render a sentence recommendation to the court, based upon the following matters: (1) Whether any sufficient aggravating circumstance or circumstances … exist; (2) Whether any sufficient mitigating circumstance or circumstances ... exist; and (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life."
New Jersey	N.J. Stat. Ann. § 2C: 11-3 (c)(3)(b)	"If the jury or the court finds that no aggravating factors exists, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant ... [to imprisonment]."

Ohio	Ohio Rev. Code Ann. § 2929.03(D)(2)	"If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances ... outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to [a term of imprisonment]."
Oklahoma	Okla. Stat. tit. 21, § 701.11	"Unless at least one of the statutory aggravating circumstances ... is so found or if it is found that any such aggravating circumstances is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed."
Oregon	Or. Rev. Stat. § 163.150(1)(b), (f)	"Upon conclusion of the presentation of the evidence, the court shall submit the following [four] issues to the jury[, one of which is:] ... (D) Whether the defendant should receive a death sentence.... If the jury returns an affirmative finding on each [of these four] issue[s including (D)] ... the trial judge shall sentence the defendant to death."
Pennsylvania	42 Pa. Cons. Stat. § 9711(C)(1)(iv)	"[T]he verdict must be a sentence of death ... if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases."

South Carolina	S.C. Code Ann. § 16-3-20(C)	South Carolina is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance.
South Dakota	S.D. Codified Laws § 23A-27A-4	South Dakota is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance.
Tennessee	Tenn. Code Ann. § 39-13-204(f)(2)	"If the jury unanimously determines ... that such [aggravating] circumstance or circumstances have not been proven beyond a reasonable doubt to outweigh any mitigating circumstances, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or imprisonment for life."

Texas	Tex. Crim. Pro. Code Ann. § 37.071(e), (g)	"The court shall instruct the jury that ... [if it answer two other questions "yes"], it shall answer the following question: Whether, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.... If the jury returns an affirmative finding on each ... [of the first two questions] and a negative finding ... [on the preceding question], the court shall sentence the defendant to death."
Utah	Utah Code Ann. § 76-3-207(4)	"The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury finds beyond a reasonable doubt that the total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances."
Virginia	Va. Code Ann. § 19.2-264.2	"[A] sentence of death shall not be imposed unless the court or jury shall ... recommend that the penalty of death be imposed."
Washington	Wash. Rev. Code § 10.95.030(2)	"If ... the trier of fact finds that there are sufficient mitigating circumstances to merit leniency, the sentence shall be death."

Wyoming	Wyo. Stat. Ann. § 6-2-102(e)	Wyoming is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance.

[Granted May 31, 2005]

IN THE SUPREME COURT OF THE UNITED STATES

[Caption Omitted in Printing]

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. In addition to the Question presented by the petition, the parties are directed to brief and argue the following Questions: "Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. Sec. 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?"; "Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?"